No. 93-141

Bupreme Court, U.S. FILED

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## In the Supreme Court of the United States

October Term, 1993

WEST LYNN CREAMERY, INC. AND LECOMTE'S DAIRY, INC., Petitioners.

V.

JONATHAN HEALY, COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE. Respondent.

> ON WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

#### JOINT APPENDIX

PETITION FOR CERTIORARI FILED JULY 14, 1993. CERTIORARI GRANTED OCTOBER 4, 1993.

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BOSTON, MASSACHUSETTS

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WEST LYNN CREAMERY, INC. ET AL. V. GREGORY WATSON, COMMISSIONER OF DEPARTMENT OF FOOD AND AGRICULTURE

#### CIVIL ACTION NO. 92-04610

July 24 1002 Complaint

July 24, 1992	Complaint
July 28, 1992	Plaintiffs' Motion for Preliminary Injunction
July 31, 1992	Application for Preliminary Injunction DENIED (Graham, J.)
August 7, 1992	Plaintiffs' Emergency Motion for Pre- liminary Injunction
August 14, 1992	Order on Plaintiffs' Motion to Stay Administrative Action and Motion for Preliminary Injunction: the plaintiffs' Motion for Emergency Relief is hereby DENIED (Graham, J.)
August 25, 1992	Answer of Defendant, Gregory Watson, Commissioner of Massachusetts Depart- ment of Food and Agriculture
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November 23, 1992	Commissioner's Opposition to Plain- tiffs' Requests for Stay and Second Emergency Motion for Preliminary Injunction (in Nos. 92-6914, 92-6924 and 92-4610)

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November 24, 1992	Plaintiffs' Emergency Motion to Enjoin the Commissioner's Decisions Pending Interlocutory Review
November 25, 1992	Plaintiffs' Emergency Motion to Enjoin the Commissioner's Decisions Pending Interlocutory Review <u>DENIED</u> (Murphy, J.)
November 27, 1992	Plaintiffs' Notice of Appeal

## COMMONWEALTH OF MASSACHUSETTS SUFFOLK SUPERIOR COURT

WEST LYNN CREAMERY, INC. V. GREGORY WATSON, COMMISSIONER OF DEPARTMENT OF FOOD AND AGRICULTURE, CIVIL ACTION NO. 92-06914

November 18, 1992	West Lynn's Petition for Review of Administrative Decision	
November 23, 1992	Hearing on Motion for Preliminary	

November 25, 1992	Answer of Defendant, Gregory Watson, Commissioner of Massachusetts Depart- ment of Food and Agriculture, re: Certi- fied Copy of Record Proceedings
December 11, 1992	Joint Emergency Motion for Reservation and Report of Case to the Appeals Court
December 11, 1992	Stipulation (the Record of Administra- tive Proceedings filed in this matter is true and accurate)
December 11, 1992	Order Reserving and Reporting Case to Appeals Court Pursuant to Mass. R. Civ. P. 64 (Flannery, J.)

## COMMONWEALTH OF MASSACHUSETTS SUFFOLK SUPERIOR COURT

LECOMTE'S DAIRY, INC. V. GREGORY WATSON, COMMISSIONER OF DEPARTMENT OF FOOD AND AGRICULTURE, CIVIL ACTION NO. 92-06924

November 18, 1992	LeComte's Petition for Review of Administrative Decision
November 23, 1992	Hearing on Motion for Preliminary Injunction (see No. 92-4610)
November 25, 1992	Answer of Defendant, Gregory Watson, Commissioner of Massachusetts Depart- ment of Food and Agriculture, re: Certi- fied Copy of Record Proceedings
December 11, 1992	Joint Emergency Motion for Reservation and Report of Case to the Appeals Court

December 11, 1992	Stipulation (the Record of Administra- tive Proceedings filed in this matter is true and accurate)
December 11, 1992	Order Reserving and Reporting Case to Appeals Court Pursuant to Mass. R. Civ.

P. 64 (Flannery, J.)

## COMMONWEALTH OF MASSACHUSETTS MASSACHUSETTS APPEALS COURT

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November 25, 1992	Petition for Interlocutory Review and Request for Oral Argument
November 25, 1992	Order Staying License Revocations Pending Consideration of this Petition and Further Order of the Court (Arm- strong, J.)
December 8, 1992	Order Staying on Conditions Commissioner's Decisions (Armstrong, J.)

### COMMONWEALTH OF MASSACHUSETTS MASSACHUSETTS APPEALS COURT

WEST LYNN CREAMERY, INC. ET AL. V. GREGORY WATSON, COMMISSIONER OF DEPARTMENT OF FOOD AND AGRICULTURE, ACTION NO. 92-P-1763

December 14, 1992 Emergency Motion for Injunction Pending
Appeal and/or Motion for Reconsideration
of Order Dated December 8, 1992

December 15, 1992 Order Consolidating Civil Action Nos.
92-04610, 92-06914, and 92-06924

December 16, 1992 Order Denying Emergency Motion for
Injunction Pending Appeal and/or Motion
for Reconsideration of Order Dated
December 8, 1992 (Armstrong, J.)

## COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

WEST LYNN CREAMERY, INC. ET AL. V. GREGORY
WATSON, COMMISSIONER OF DEPARTMENT OF
FOOD AND AGRICULTURE,
SJC-6140

December 21, 1992	Court No. 92-P-1763 to the Massachusetts Supreme Judicial Court
December 22, 1992	Transferred from Appeals Court: Brief and separate Appendix (Vols. I and II) for plaintiffs/appellants; Brief for defendant/appellee

January 6, 1993	Oral Argument Held.
April 15, 1993	Opinion Issued
April 28, 1993	Plaintiffs' Emergency Motion for Stay of Issuance of Rescript Pending Review by the United States Supreme Court
April 30, 1993	Commissioner's Opposition to Motion to Stay Issuance of Rescript
May 5, 1993	Motion for Stay of any Order which the Court may Issue Relative to the Injunc- tion Entered by the Single Justice of the Appeals Court on December 8, 1992
May 10, 1993	Commissioner's Opposition to Motion to Stay Order
June 9, 1993	Order Staying Issuance of Rescript
August 5, 1993	Notice of Filing of Petition for Certiorari from the Clerk of the United States Supreme Court
October 4, 1993	Petition for Writ of Certiorari Granted by the United States Supreme Court

#### **MEMORANDUM**

To:

General Court

From:

**Special Commission** 

Dated:

May 20, 1991

Subject:

Results of Study and Recommendations

Establishment of Dairy Stabilization Fund

# REPORT AND RECOMMENDATION OF THE GOVERNOR'S SPECIAL COMMISSION RELATIVE TO THE ESTABLISHMENT OF A DAIRY STABILIZATION FUND

#### REPORT SUBSEQUENT TO PUBLIC HEARINGS

#### I. Establishment of Special Commission

Recognizing the critical situation, the General Court, on December 20, 1990, resolved that a special commission be established to investigate and study the dairy industry in Massachusetts. The commission was charged with holding at least one public hearing and reporting to the General Court the results of its investigation together with the recommendations and draft legislation necessary to carry out the recommendations.

The commission, in conjunction with the Department of Food and Agriculture, held three public hearings and met on several occasions to discuss the necessary recommendations. Below is a discussion of the testimony received at the public hearings, the results of the investigation and the recommended course of action.

For your consideration and assistance, a statement of the history of the current crisis affecting the local dairy farmers, an explanation of the federal and state regulatory systems governing fluid milk sales, and a summary of the testimony by comment area are provided.

Presented To:

Submitted By:

Dated:

General Court Special Commission May 20, 1991

#### II. Public Notice

Public hearings were conducted at the University of Massachusetts, Amherst on May 6, 1991; One Ashburton Place on May 7, 1991 and the Worcester Horticultural Society on May 7, 1991 in order to hear and receive testimony from interested parties concerning the state of the dairy industry in Massachusetts.

Notice of the hearings was provided by the following methods:

#### Published in:

- Springfield Union news on April 15, 1991.
- Boston Herald on April 15, 1991.

#### Filed with:

- Executive Office of Communities and Development
- Secretary of State, Regulations Division

Approximately 317 people attended the public hearings: 87 people presented oral testimony; 87 submitted written testimony.

(References in this report to "the Department", unless the context indicates otherwise, means the Department of Food and Agriculture.)

#### III. Introduction

Massachusetts dairy farmers have been the stewards of the commonwealth's land since the first decade of the sixteenth century. Since that time, they continuously provided the citizens of this Commonwealth with an abundant supply of an essential commodity: fresh milk. It has only been during the past ten years that the local dairy farmers have been forced to sell their farms due to drastic losses of income. They have either gone bankrupt or been forced to sell their land as it became impossible to operate the farm as a sustainable business.

This loss of profitability was not due to the farmers' mismanagement or inefficiency. They became the subjects of an industry slowly being overrun by big business in the larger milk producing states in the mid-west. From 1980 to date, Massachusetts has lost 434 farms, a decline of 829 to 395: approximately 48% of our dairies.

Right now, our farmers are facing a crisis. The price of milk, established by a complex set of federal regulations, has declined 30% in the past year and, in fact, is at the same level as set by the federal government in 1978. Although the cost of production has increased over the last thirteen years, farmers are being paid a price for their product at a level \$3.00/cwt below their cost of production. Much of the problem stems from the archaic system which governs pricing of milk.

It is undisputed, by farmers and dealers, that if the price paid to farmers for their milk is not significantly increased immediately, a majority of the remaining Massachusetts dairy farmers will be forced out of-business within the year. The importance of supporting this industry, and the nearly 300,000 acres of well maintained open land it preserves in the Commonwealth, was emphasized throughout the hearings. Without the continued existence of dairy farmers, the Commonwealth will lose its supply of locally produced fresh milk, together with the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education.

We are all aware that taking action to provide the farmers with a fair price for their product may cost the milk consumer money, but, a loss of these local farms will cost the consumer more, both monetarily and environmentally.

#### IV. Federal Price Setting Scheme

In order to understand the reasons Massachusetts farmers are facing the current problem, it is necessary to review the system which establishes milk pricing. For a majority of the country, the price which farmers are paid for their milk is established by the federal government. The Agricultural Agreement Act was established by Congress in 1937 in order to protect the dairy industry and ensure the survival of dairy farming. The Act provides for a creation of federal milk marketing orders which create a complicated system for determining what price farmers will be paid for the milk they produce. The original intent being to stabilize prices to ensure a continuous supply of milk.

The base price for this system is established by a monthly survey of farmgate prices for "manufacturing" milk in Minnesota and Wisconsin, the "M-W price". The M-W price is the average price paid by approximately 110 cheese, butter and powdered milk manufacturing plants for Grade B milk in the Minnesot-Wisconsin area. (Grade B Milk cannot be sold for fluid consumption. It can only be used for manufactured products).

These plants in the Minnesota-Wisconsin area pay a price for milk which is a total free market price and is influenced by factors such as milk supply/seasonal supply, feed costs, and price supports. There is no regulatory system which determines what these plants must pay to the dairymen in these areas. Each month a survey is taken to determine the average that these plants pay for milk. That average becomes the M-W price — in essence the basis upon which the price of milk virtually everywhere else in the U.S. is determined.

When there is a surplus of milk, the federal government (via its purchases) becomes the major factor in the milk market and the federal support price (the minimum price the government will pay dairy farmers for their [Class B] milk used to make manufactured dairy products) sets the M-W price. The huge factory farms in California and the Southwest are primarily responsible for creating these surpluses by using taxpayer-subsidized water to raise feed year-round and produce enormous quantities of cheap milk.

The ultimate price paid to farmers in other areas of the country are determined through a complex and convoluted formula which supposedly makes allowance for regional differences in production costs, supply and demand, ultimate utilization of the finished product, etc. Regrettably, this formula, however effective it may once have been, no longer reflects the distinct and unique needs of the New England region in general nor Massachusetts in particular.

The M-W price does not adequately reflect the significantly higher costs of maintaining an agricultural enterprise in this area of the country, particularly since the industry in the M-W region consists largely of "factory farms", with huge herds, vast acreage, and the ready availability of both supplies and labor, as opposed to New England where small, family operations are the rule. Another inequity of the current procedure is that every facet of production is not always calculated into the federally-mandated price. For example, the state of California has become a huge supplier of low-cost milk in recent years, a fact made possible by the ready availability of water from various federally-funded projects. This essentially provided an invisible subsidy to the California milk industry at the expense of other areas of the country.

Recent events demonstrate that this system no longer accomplishes its goal nor provides a stable, minimum price for dairy farmers operating in New England and the northeast. The January, 1991 blend price for Federal Milk Order I was twenty seven percent (27%) less than the January, 1990 price. This represents the largest year-to-year change in the history of the New England Order. This precipitous drop in the federal

market order price of milk is part of a decade-long trend of decreasing prices paid to farmers that poses an unprecedented threat to the viability of the region's dairy industry.

The average Northeast dairy farmer's 1989 milk price was \$14.46 per hundredweight (cwt: 100 pounds of milk: 11.6 gallons). This was \$1.41/cwt higher than in 1988 and represented their best year of the decade. Nonetheless these prices were still below 1979 levels. Net earnings per cow in 1979 was \$249 compared to \$121 in 1989.

Not only did prices continue to fall but, the costs of production rose, health standards became more stringent, and production equipment became outdated. Dairy farmers' cost of producing milk increased by \$1.00/cwt. in 1989 to \$13.95/cwt. This figure does not include a return on the \$33.00/cwt. of the farmer's own equity invested in his or her business. Higher feed prices caused expenses to increase by \$61.00 per cow or \$.32/cwt. The average dairy farmer's interest expense increased \$21.00 per cow in 1989.

Presently, there is no commodity, with the possible exception of alcoholic beverages, as heavily regulated and controlled as is the milk.

#### V. Other New England States

The problem discussed above is not unique to Massachusetts. The other New England states also recognize the crisis facing their dairy farmers. While these states have all discussed entering into a regional compact to set uniform prices throughout the region, it is acknowledged by those involved that such a compact could take as long as five years to go into effect; requiring Congressional approval.

Although these states are reviewing legislation to implement the compact, they recognize the need for immediate action and each have legislation pending to raise the price paid

to their dairy farmers. These states include Maine, Vermont, New Hampshire, New York, Connecticut and Rhode Island.

#### VI. Testimony

Participation at the hearings was extensive. Realizing the broad impact of the problem, a diverse group of people presented both oral and written testimony including consumers, land preservationists, environmentalists, sportsmen, business people, farmers, milk handlers and dealers, local officials and state representatives and senators.

Attached are the sign in sheets from the hearings for those people who presented oral testimony. A list of names of the persons who submitted written comments, or a copy of the comments, is available upon request.

#### VII. DISCUSSION OF TESTIMONY

For organizational purposes, the areas of comment are organized by interest groups and the particular concerns relating to the crisis:

#### CONSUMER/PUBLIC

Through over nine hours of public testimony, not one voice spoke out in opposition to increasing the price farmers are paid for their milk. Rather, uniformly, these constituents expressed concern over losing the rural character of Massachusetts. Many of the people who testified identified their interest in the situation relating to the preservation of farmland and open space. The overriding concern was not that the retail price of milk would be raised, but that the natural characteristics of the Commonwealth would be gone forever if we lost our dairy industry.

In reality, the estimated two cent increase per quart of milk would not be noticed by the consuming public. There is already a great disparity in price, about twenty cents per gallon, between the different brands of milk sold in stores. In addition, the price of milk in Massachusetts in twenty six cents a gallon less than the national average. Most importantly, although the price paid to farmers for their milk has dropped thirty percent in the last year, the retail price has not decreased proportionately. The consumer has not benefitted from the lower milk price as the retail stores continue to reap the profits.

Consumers are not adverse to paying an additional two cents in order to "save" the local dairies. These constituents realized that the benefits received by the citizens of Massachusetts far outweigh any minor increase in the retail price of milk. Farmers have always been very generous with sharing their land and allow the public to utilize this 300,000 acres for a variety of activities including horseback riding, snowmobiling, skiing, hunting and fishing.

The National Rifle Association, the sportsman's clubs and land trusts have unanimously spoken out in favor of supporting the dairy industry. They stress the fact that if these acres are not preserved, a national heritage, accessible open space and the character of our land will be lost forever.

Environmental groups also stressed that this land provides increasingly necessary habitat for wildlife and protects the land from development and further environmental degradation. One national group also stressed that small farmers are better able to control their use of pesticides and protect our resources than large scale agri-businesses.

Most importantly perhaps, the consumers realize that if local dairies are not producing, our milk will be trucked in from other states like Pennsylvania and Ohio. As an extremely perishable item, the milk will not be as fresh, will not be able to be retained for long in the stores or at home and will support

the dairy industries of other states for an even higher cost to the local consumer. It costs an average of four cents per hundredweight (.40/cwt) to ship milk every 100 miles.

If our local supply of milk is not protected, the Massachusetts consumer's cost of milk will greatly increase and the citizens of Massachusetts will become entirely dependent on other states to ensure a supply of an essential commodity. The public unconditionally supported an increase in the price farmers are paid for their milk, stressing that their interests are not in conflict with that of the farmers. The inevitable harms associated with the loss of the dairy farmer are far greater than the potential rise in milk prices.

## RELATED AGRICULTURAL BUSINESSES

The loss of these farms will not only impact the dairy farmers, but the effect will ripple into a variety of related businesses. Many of the people who testified are operating agriculture related companies such as farm equipment sales, feed stores, artificial insemination services, farm credit institutions and the like. Each of these groups are in favor of the state increasing the amount dairy farmers are paid for their milk.

As each dairy farm goes out of business, these related industries lose a customer and find it less and less profitable to stay in business in Massachusetts. These businesses may also not be paid on amounts owed for many months, or not at all. As each one of these businesses decides to close their local offices, other farmers, both dairy and non-dairy, are effected. Each farmer has to travel farther to obtain these services, continually increasing the cost of their production.

These businesses have already noted that their accounts receivables are down considerably since last year. As generators of millions of dollars of income, these businesses are an integral part of our states economy and will contribute to the states eco-

nomic hardships if forced to move their offices to neighboring states. It is important that the infrastructure of the agricultural businesses of this state are preserved. Increasing the amount farmers are paid for their milk will insure the future viability of the related community.

#### **DAIRY FARMERS**

A majority of the offered testimony was provided by the state's dairy farmers, in unequivocal support of the establishment of a milk price higher than the federal milk order price. The farmers stated that they are not looking for a "hand out" but they are asking that they get paid a "fair" price for their product. As the sale of milk is not based upon a free market system, Massachusetts farmers have no control over the price they are paid for their milk. It is the federal and state governments obligation to establish a price for milk which will stabilize and ensure the future viability of the dairy industry.

At the focal point of the farmers testimony was the fact at the current price they are paid for their milk is the same price as they were paid in 1979. The overall price for milk has steadily been declining over the last ten years whereas the cost of production has continually increased. Clearly, this presents an extremely bleak picture to our farmers.

Virtually every factor of production required in their business has significantly increased in cost since 1979. Although each farmer is operating under a unique set of conditions, the experience of one farmer may serve to illustrate the problem:

In 1979 this farms feed bill was \$38,700, today it is \$108,000; fertilizer costs of \$4,675 have now grown to \$34,330; utilities have risen from \$2,220 to \$11,020; insurance costs have risen from \$1,146 to \$6,074; tax levies have gone from \$2,065 to

\$14,878, rent from \$1,040 to \$6,390 and interest payments from \$350 to \$7,737. Even a minor item, such as sawdust bedding for the animals, has increased from \$155 to \$7,410.

The operating expenses for this farm have increased approximately 400% and yet, they are receiving the same price for their milk as in 1979. Clearly, they can not continue to operate on this basis for very long.

Furthermore, most Massachusetts farms have increased production significantly over the years, in some instances as much as 20% and more. Thus, the problems facing the industry are not the result of inefficient operations or mismanagement. Similarly, it has been suggested that farmers, in attempting to raise their incomes, have increased production to the point where they have created a surplus of the product, glutting the market and lowering prices. On the other hand, it is generally agreed that any surplus production of milk amounts to only some 6% over present consumption levels. It does not seem reasonable to argue that an oversupply of only 6% of any product would result in a drop of nearly 50% in wholesale prices on the total amount of that product produced nationwide. In either event, the surplus is not created by Massachusetts farmers as a heavily consuming state, this Commonwealth only produces approximately one third of the milk we consume.

As indicated, the problem facing the Massachusetts dairy farmer is a drastic decline in milk prices with increases in cost of production. It is estimated that it costs an average of \$15.00/cwt to produce milk. The Order I blend price paid to farmers for their milk in April of 1991 was \$11.94: resulting in a loss of \$4.06 for each cwt produced.

Not only is the economic tightrope getting longer for the producers, their safety rope is also slipping. Each spring many farmers borrow funds to purchase supplies, including fertilizer and seed, for their yearly planting. This amount is then repaid in the fall, after the peak production season. As the Farm Credit Bank estimates that the farmers cost of production is higher than the amount paid for the product, they are continually refusing to extend credit. Without the ability to produce the feed for the cows, and a lack of money to purchase feed, the farmer is unable to maintain the herd.

There is no other industry in which a producer has no choice but to sell his product below cost at an artificially set price. Without an increase in their price, the dairy farmers have stated that they will have no alternative but to sell their farms for development and abandon the way of life which their families have chosen for several generations.

#### **DEALERS**

The Association of New England Milk Dealers has submitted testimony in support of a price increase for fluid milk. The milk dealers realize that their success is tied to the survival of milk producers. Since the dealers operate on a regional level, however, their testimony stresses the need for a regional solution — to place all dealers on an equal purchasing field.

As acknowledged earlier, all the New England states realize that a regional compact is desirable in order to sustain the regional dairy industry in the future. Such a compact, after authorization by Congress, would allow the states to negotiate for the terms and prices for milk purchased within the entire region. In the interim, prices must be raised within each state. The dealers do not oppose a price increase, but have expressed concern over the funds being deposited into a state account for redistribution, and not paid directly to the farmers.

Practical aspects of a price increase require that monies generated from the increase be placed into a fund and redistrib-

by them. So long as a trust account is established for the placement of these funds, the dealers fear — that the money will be deposited into the general fund and appropriated for other uses — is unfounded. The envisioned scheme is not a tax, and the monies would not be deposited into the general fund. The necessary program would raise the price a farmer receives for his milk and the money would be distributed, from a trust fund, to the farmer.

So long as the pricing increase is applied equally to all dealers, those located within and out of state, dealers selling in Massachusetts will not be placed at a disadvantage. Furthermore, since the dealers negotiate the price they are paid for their product on a free market basis, they can pass any increased cost along to the retailer, and eventually the consumer who supports this increase.

#### VIII. CONCLUSION

An increase in the price Massachusetts dairy farmers are paid for their milk is essential. As the cost of production is approximately \$15.00 and the current blend price they are paid by handlers is \$11.94, and increase of 4.06/cwt is warranted. Since, however, the federally established price of milk is constantly changing, the increase should be based on a sliding scale to meet the intent of the program: to stabilize milk prices and ensure the viability of the Massachusetts dairy industry.

This increase can be accomplished by adopting legislation mandating the dealers to pay an established amount, based on the amount of fluid milk they sell in Massachusetts, into a fund. The money in this fund would then be distributed back to the farmer, providing them with a fair price for the milk. By establishing this increase, the Commonwealth will acknowledge its commitment to ensuring that its citizens are provided with a supply of fresh milk; promoting the survival of our national heritage; promoting agricultural industries; maintaining an educational foundation for future generations; preserving our ever decreasing open lands and tourism; and establishing preserves for wildlife and recreation.

#### IX. RECOMMENDATIONS

After extensive study, the Governors Special Commission Relative to the Establishment of a Dairy Stabilization Fund recommends the House Bill No. 4390, as amended, be adopted; and review of House Bill No. 1964 (Compact) commence immediately. Upon redraft, the Compact should be adopted as soon as possible.

## FINDINGS AND DECLARATION OF STATE OF EMERGENCY IN THE MASSACHUSETTS DAIRY INDUSTRY

#### MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

Dated: January 28, 1992

#### REPORT SUBSEQUENT TO PUBLIC HEARING

## I. Petition to Hold Public Hearings

On November 13, 1991 a petition was delivered to the Department of Food and Agriculture, requesting that the Commissioner hold hearings regarding the state of the dairy industry in Massachusetts and declare that a state of emergency exists. The petition was filed pursuant to M.G.L. c. 94A section 12.

The petition and signatures were reviewed and it was confirmed that at least twenty five percent of the licensed producers of milk within the petitioning market areas signed the petition under the pains and penalty of perjury. In fact, approximately fifty percent of the state's dairy farmers signed the petition.

In response to the petition, the Commissioner held two public hearings this week. Based upon the information already available to the Department and the Report of the Special Commission dated May 1991, the situation warranted that the Commissioner also hold hearings pursuant to sections 10 and 11 of the statute, and ascertain what prices, terms and conditions relative to milk would be most beneficial to the public interest and would best protect the milk industry. Therefore, complete investigatory hearings were held in relation to the entire milk industry.

#### II. Public Notice

Public hearings were conducted at the University of Massachusetts, Amherst on January 15, 1992; and One Ashburton Place on January 14, 1992 in order to hear and receive testimony from interested parties concerning the state of the dairy industry in Massachusetts.

Notice of the hearings was provided by the following methods:

#### Published in:

- Daily Hampshire Gazette on December 21, 1991.
- Boston Herald on December 21, 1991.

#### Filed with:

- Executive Office of Communities and Development
- Massachusetts Municipal Association
- Secretary of State, Regulations Division

## Sent by first class mail or facsimile to:

- All licensed milk dealers
- Agri-Mark and Mass. Milk Producers Cooperatives
- Massachusetts Farm Bureau
- Country Folks

Approximately 260 people attended the public hearings: 83 people presented oral testimony; 86 submitted written testimony. Additionally, some 10,000 consumers from across the Commonwealth signed a petition calling for equitable returns for dairy farmers.

#### III. Introduction

In May of 1991, a Special Commission to Investigate and Study the Dairy Industry in Massachusetts was appointed by the Governor. The commission held public hearings, met on several occasions and provided a written report to the General Court, which concluded that the Commonwealth's dairy farmers are facing a crisis. This report is attached and incorporated herein.

Since that time, little has changed to improve the situation confronting these farmers. In fact, the situation has only become more desperate. As during the previous hearings, no testimony was received indicating that a crisis does not exist. Evidence was presented from various sectors of the public, not only dairy farmers. Testimony was received from consumers, agricultural industries, economic and financial experts, environmental groups, milk dealers, sportsmen's associations, educators, other agricultural commodity groups, as well as state legislators from both political parties.

## IV. Investigation

Updates on Prices:

In 1990, the average federal blend price paid to Massachusetts dairy farmers (prior to deductions for trucking, cooperative dues, advertising allotments, stop charges, etc.) was \$14.67 per hundredweight (cwt), approximately 11.6 gallons. In 1991, the average blend price was only \$12.64. Given that the Special Commission's report estimated the average cost of production at \$15.50, and the current testimony supports this fact, our dairy farmers lost an average of \$2.86/cwt last year.

One of the farmers testified that his production of 240,000 lbs of milk per month translates to a loss of approximately \$6,864 each month. It is not surprising that our dairy farmers, who not long ago were debt free, are no longer able to pay for feed for the cows, have been forced to mortgage homes which have been in their families for generations, are working

twelve hours, seven days a week to operate at a loss while being forced to forsake such basic necessities as medical insurance for their families.

A prime example of the financial crisis facing Massachusetts dairy farmers is illustrated by the fact that one of the state's largest dairy producers, whose family farmed for three generations, were forced to auction their herd this past summer. They reported that during the past year alone, milk income was down twenty seven percent, representing a loss of \$134,540 in milk income. For both 1990 and 1991, even with a twenty three percent reduction in expenses, their expenses exceed their income resulting in net losses for the farm. Without a savings account, they would not have been able to survive and, not seeing an end to their losses, they chose to make the choice to sell.

The testimony is fraught with accounts of losses and pleas for immediate redress. As during the Special Commission hearings, the testimony stresses that the price farmers are paid for their product is approximately the same as in 1978. At the same time, the uncontrollable costs of production have continued to rise. The costs of health insurance, car insurance, home insurance, equipment, heating, electricity, education, worker's compensation, taxes, feed and food, to name only a few expenses, have increased considerably since 1978.

"An Economic Analysis and Forecast of Massachusetts Dairy Farmer Exits," prepared by Professor Lass of the University of Massachusetts, predicts that without immediate price stabilization, the state will lose over one third of its remaining dairy farms during the next year. On the other hand, the report also predicts that, with price stabilization, over eighty percent of those farmers will remain in productive agriculture.

During the summer of 1991, an "Over Order" premium was established by the Commissioner. This Order, provided the dairy farmers with an average of \$.74/cwt over the blend price.

Unfortunately, this pricing could not be maintained since New York was forced to discontinue its own over-order pricing. Since New York is by far the largest milk producer in the region, this action led to the collapse of the Massachusetts Over-Order. This type of stabilization remains necessary in order to ensure a continued production of a supply of fresh milk.

If no action is taken, the entire New England dairy industry will collapse and milk will be imported from greater and greater distances. In fact, Wisconsin farmers have petitioned the USDA to allow shipments of powdered milk to be trucked to states like Massachusetts, reconstituted, and treated as Class I fluid milk, despite significant losses of flavor and nutritional value during processing and shipping.

Update on other states' actions:

Since last year, the entire dairy industry has indicated that it is facing a disaster. New England states are pursuing every avenue possible to prevent the demise of their dairy farmers. Maine passed legislation placing a tax on milk, giving a portion to the farmers, a portion to the WIC program and a portion to fund the farmland preservation program. Vermont has eagerly been awaiting developments in other states, such as a regional interstate compact, while New York farmers may petition for another Over Order.

As each state is unique, Massachusetts needs to find a solution suitable to its dairy industry, recognizing that we are currently the largest fluid milk consuming state in the Northeast. While we continue to pursue a regional solution, the current situation cries for immediate action. Although we acknowledge the milk dealers' desire for a regional pricing structure, we must ensure the survival of our indigenous dairy production while this avenue is aggressively pursued.

#### V. Conclusion

In order to alleviate the situation facing the our milk industry, a system of price stabilization must be implemented as quickly as possible to ensure the dairy farmer a fair price for his commodity, reflective of the cost of production in New England. This system must also address the regional character of the flow of milk and the need to provide consumers with a high quality product at a reasonable price.

An "Over Order" assures the Massachusetts dairy farmer a price "over" the federally established price, based upon the unique circumstances facing each state. The Department should prepare regulations, in the nature of an Over Order, which would create a mechanism ensuring the Massachusetts dairy farm an amount "over" the federally regulated blend price for milk. The Department should provide the mechanism for payment, and all funds should be collected only on behalf of Massachusetts producers. Any excess should be returned directly to dealers, with no amount taken out for administration of the program.

In addition, every effort should be made to pursue a regional compact. Although this solution is a long term goal, requiring adoption of an identical compact in at least four states and congressional approval, Massachusetts, as a large consuming state, will play a pivotal role in the potential future of any such compact.

#### COMMISSIONER'S DECLARATION OF EMERGENCY

As Commissioner of Food and Agriculture for the Commonwealth of Massachusetts I have determined that an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens a cornerstone of our state's agricultural industry. I reach this conclusion after a series of investigatory hearings and reviewing testimony from farmers, consumers, and experts from various facets of this complex industry.

These findings confirm the conclusions reached last May by the Special Commission on Dairying. Today, however, the crisis is more serious and the need to act more pressing. Regionally, the industry is in serious trouble and ultimately, a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry, maintain reasonable minimum prices for the dairy farmers, thereby ensure a continuous and adequate supply of fresh milk for our market, and protect the public health.

Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem.

Signed this 28th day of January 1992.

GREGORY C. WATSON COMMISSIONER

## AMENDED PRICING ORDER

Pursuant to Massachusetts General Laws Chapter 94A Sections 10, 11, and 12, the Commissioner hereby Orders that each licensed milk dealer comply with the following Pricing Order:

#### I. Preamble

The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices.

This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk.

#### **Definitions**

The terms used in this Order shall be defined in accordance with M.G.L. c. 94 and 94A, and for the purpose of this Order, the following words shall have the following meanings:

Committee: The Massachusetts Dairy Industry Committee.

Dealer: any person who is engaged within the Commonwealth in the business of receiving, purchasing,

pasteurizing, bottling, processing, distributing, or otherwise handling milk, purchases or receives milk for sale as the consignee or agent of a producer, and shall include a producer-dealer, dealer-retailer, and sub-dealer.

Dealer-retailer: a person who is a dealer and who also sells at retail the milk handled for sale, shipment, storage or processing within the Commonwealth.

Producer: any person producing milk from dairy cattle.

Producer-Dealer: a dealer who also produces a portion or all of the milk they handle.

Sub-dealer: any person who does not process milk and who purchases milk from a dealer and sells such milk in the same containers in which he purchased it, but shall not include a store.

## Massachusetts Dairy Industry Committee

- A. The Commissioner shall establish the Massachusetts Dairy Industry Committee to assist in administration of this Order, and advise the Commissioner on pursuit of a regional milk marketing strategy.
- The Commissioner shall request that a representative from each of the following sectors of the milk industry participate on the Committee chaired by the Commissioner, or his designee: a dairy farmer, a co-operative representative, a milk dealer, a producer-dealer, a retailer, and a member of the Board of Agriculture. The Secretary of the Executive Office of Consumer Affairs or their designee, and

- the Secretary of the Executive Office of Economic Affairs or their designee may sit on the Committee as additional advisory members.
- C. Every three months, the Department shall submit a summary of the monthly reports and any other relevant information to the Committee to assist the Committee in its advisory capacity.
- D. The Committee may provide advice to the Commissioner regarding the implementation and administration of this section, and may provide the Commissioner with a biannual review of the dairy industry.

## IV. Monthly Reporting Schedules

- A. Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month, commencing with the month of May, for the reporting month of April.
- B. The Monthly Reporting Schedule shall be a form provided by the Department, which shall include, but not be limited to the following information:
  - the amount, in pounds, of Class I milk sold for consumption in Massachusetts during the past month, not including sales to another Massachusetts licensed dealer;
  - (2) the amount, in pounds, of fluid milk received from each Massachusetts producer during the past month.
  - (3) the amount owed to the Fund as calculated according to the formula in paragraph V of this Order.

C. Every Massachusetts producer who holds a valid certificate of registration, and does not ship milk to a milk dealer licensed by the Department, or to a co-operative, must provide the Department, by the twenty fifth day (25th) day of each month, a statement of the amount of milk produced and sold during the previous month and proof of such amount.

## V. Pricing Order Fund

- A. Every dealer, as defined in this Order, is subject to payment into the Massachusetts Dairy Equalization Fund based on the initial sale of Class I milk in Massachusetts. In cases where the same milk is handled by more than one dealer, the dealer which is the final entity to handle said milk for wholesale or retail sale within the Commonwealth shall be deemed to be the dealer required to report such sales.
- B. In calculating the amount owed in paragraph IV. B.3. of this Order, the following formula shall be used:
  - (1) Calculation of the Order Premium

where.

Blend = The blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 price for the second preceding month (i.e.: for the reporting month of April, use February Blend), plus any state mandated premium.

(2) Calculation of the Premium Payment

Order Premium × Amount sold for Class I utilization, calculated in paragraph IV. B. (1) = Premium Payment.

#### VI. Order Distributions

- A. The Commissioner shall direct that monthly distributions from the Fund are made by the fifth (5) day of each month, commencing with the month of June, in the following manner:
  - (1) Payment shall be made directly to every Massachusetts producer based upon their proportion of milk produced in Massachusetts according to the following formula:

A/E = W

F × W = amount distributed to Massachusetts producer

where,

- A = amount, in pounds, produced by the producer for the reporting month, except that in no case shall the amount in "A" exceed two hundred thousand (200,000) pounds.
- E = the total monthly sum, in pounds, of milk produced in Massachusetts.
- W = proportion of producer's contribution to Massachusetts milk production.
- F = amount, in dollars, in the Order fund for the reporting month.

- (2) In no case shall the distribution to the producer exceed the figure determined in (3) below.
- (3) The maximum distribution to the producer shall be determined by according to the following formula:

$$15.00 - Blend = T$$

T × A = maximum amount which can be distributed to the Massachusetts producer.

Blend = the blend price per hundredweight (cwt) as reported by the USDA for Order I/Zone 21 for the second second preceding month.

T = Target Differential

A = amount, in pounds, produced by the producer except that in no case shall this figure exceed two hundred thousand pounds.

- B. All amounts received pursuant to this Order shall be distributed by the Commissioner for the purposes of this Order only and all amounts shall be distributed directly to Massachusetts producers, except those amounts returned to the licensed dealers in accordance with paragraph C, below.
- C. After the Order amount has been distributed to every Massachusetts producer, the Commissioner shall direct that the remaining balance be distributed directly to the licensed dealers, based upon each dealer's proportionate contribution to the total fund on or before the fifth (5) day of the month.

#### D. Adjustments:

- 1. Whenever verification of reports or payments of any dealer discloses errors made in payments to or from the Fund, the Department shall promptly notify such dealer of any unpaid amount, and such dealer shall, within five (5) days, make payment of the amount so billed. Whenever verification discloses that payment is due from the Fund to any dealer, the Commissioner shall, as promptly as possible, direct that such payment be made.
- Whenever the Commissioner is required to make payments to a dealer pursuant to the prosions of this Order, and any amount is due from the dealer to the Fund for the same payment period, the Commissioner may issue a credit to the dealer for the amount of the payment in lieu of the payment in order to balance the amounts owed.

#### VII. Enforcement

A. In the event that a producer or milk dealer provides false information or attempts to misrepresent information required pursuant to this section, or fails to pay the amounts owed in accordance with this Order, or fails in any other way to comply with the terms of this Order, the Department shall conduct a hearing in accordance with M.G.L. c. 94A section 6, to determine if suspension or revocation of the license is warranted.

## B. Any person found in violation of any provision of this Order shall be subject to civil or criminal penalties pursuant to M.G.L. c. 94A section 22.

## VIII. Miscellaneous Provisions

- A. Continuing Obligation of Dealers: Unless otherwise provided by the Commissioner upon termination of any or all of the provisions of this Order, such termination shall not:
  - Affect, waive or terminate any right, duty, obligation or liability which shall have arisen or may thereafter arise in connection with any provisions of this order;
  - Release or waive a violation of this Order occurring prior to the effective date of termination;
  - (3) Affect or impair any right or remedy of the Commissioner or of any other person with respect to any such violations.
- B. No dealer, including stores, shall unconsionably increase the price charged for Class I milk. The Commissioner shall continue to monitor the pricing structure of milk sold for Class I consumption within the state to determine if they are unconscionably excessive in response to this Order. Upon a determination by the Commissioner that any price is unconscionable, the Commissioner shall provide the dealer with an opportunity for a hearing in accordance with M.G.L. c. 94A section 6, and take appropriate action in accordance with said section.

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- C. Continuing Power and Duty: If, upon termination of this Order, or any part thereof, there are any obgations arising hereunder, the final accrual or ascertainment of which require further acts by any dealer or by the Commissioner, the power and duty to perform such further acts shall continue.
- D. Liquidation: Upon the termination or suspension of this Order, the Commissioner shall dispose of all funds received pursuant to the provisions of this Order, in an equitable manner, together with claims for any funds which are unpaid and owing at the time of such termination or suspension.

#### Effective Dates IX.

This Order is implemented pursuant to the emergency provisions of M.G.L. c. 94A and M.G.L. c. 30A section 2 and is effective immediately. The first Monthly Reporting Schedule shall be due by May 25th, 1992 for the reporting month of April 1992.

The provisions of this section shall cease to be in effect in the event that price setting is established pursuant to an interstate dairy compact, approved by Congress.

> Signed this 26th day of February, 1992

## GREGORY C. WATSON **COMMISSIONER**

This Order amends the Pricing Order dated February 18, 1991, for technical, clarification purposes.

## MONTHLY REPORTING SCHEDULE 1992 PRICING ORDER MAY 1992

Pursuant to the 1992 Pricing Order issued by the Commissioner of Food and Agriculture under the authority of M.G.L. Chapter 94A, sections 10, 11 and 12, all milk dealers including collective cooperatives are required to submit a completed Monthly Reporting Schedule on or before the twenty-fifth of each month. In order to comply with the Order, every licensed milk dealer and collecting cooperative must complete and submit this form along with the appropriate payment by the 25th of each month.

DEALER: West Lynn Creamery	Inc.
ADDRESS: 626 Lynnway, Lynn,	MA 01905
REPORT FOR MAY	Y 1992
MILK RECEIPTS FOR MAY 1992	HUNDREDWEIGHT
<ol> <li>Receipts from Massachusetts Producers</li> </ol>	5,214
<ol><li>Receipts from Non-Massachusetts Producers</li></ol>	225,684
<ol><li>Receipts from Cooperatives</li></ol>	24,121
<ol> <li>Transfers or Receipts of Bulk OR Packaged Milk</li> </ol>	973
<ol><li>Own Production</li></ol>	0
<ol><li>TOTAL RECEIPTS</li></ol>	255,992
CLASS I MILK SALES FOR MAY 1992 All Milk dealers are required to report the irr of Class 1 milk.	
7. Class I Milk Sold Retail & Wholesale in Massachusetts	114,900
<ol> <li>Class I Milk Sold Out of Massachusetts</li> </ol>	60,576
<ol> <li>Class I Milk Sold to Other Milk Dealers</li> </ol>	17,488
<ol><li>Total Class I Milk Sales</li></ol>	192,964

#### AMOUNT SOLD TO OTHER MILK DEALERS

 For sales to other Massachusetts dealers (#9 from page 1), attach a list of the dealer's name and the amount sold to each dealer during May 1992.

## PURCHASES OF MILK FROM MASSACHUSETTS PRODUCERS

- For receipts from Massachusetts producers (#1 from page 1), attach a list of the producers' names and the amount purchased from each during May 1992.
- Number of Massachusetts Producers \_\_\_\_\_\_6

#### **CALCULATIONS**

- STEP 1: \$15.00 minus March's Zone 21 blend price (\$12.20) = \$ \_\_2.80
- STEP 2: Divide the amount in STEP 1 by 3 = \$ \_\_\_.933
- STEP 3: Multiply the amount from STEP 2
  by your total Massachusetts Class 1 milk sales
  as reported in #7 on page 1 = \$ \_\_\_107,201.70

For the amount calculated in STEP 3 include with this completed form a check payable to:

#### Massachusetts Dairy Equalizatin Fund

This completed form, the May 1992 Federal Market Administrator's Form No. 1, and a copy of the Federal Market Administrator's computer generated "Receipts and Utilization" (where applicable) must be received by the Department no later than June 25, 1992.

Mail To: Bureau of Milk Marketing
Department of Food and Agriculture
100 Cambridge Street, 21st Floor
Boston, MA 02202

I, the undersigned, hereby declare under the penalties of perjury as provided in M.G.L. c. 268, section 1A that the information given in this report is true to the best of my knowledge and belief. Any person providing false information is subject to license suspension/revocation pursuant to M.G.L. c. 94A, section 6.

Number of Federal I.D. Number	
Authorized Signature	Date
Title	

If there are questions on the completion of this form or requirements of the 1992 Pricing Order, please contact the Department of Food and Agriculture at 617-727-3020 x 140 or 138.

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**CIVIL ACTION NO. 92-4610** 

WEST LYNN CREAMERY, INC. and LeCOMTE'S DAIRY, INC. Plaintiffs.

V.

GREGORY WATSON, COMMISSIONER, Massachusetts Department of Food and Agriculture,

Defendant.

#### COMPLAINT

## INTRODUCTORY STATEMENT

1. This is a civil action challenging the enforcement of a 1992 "Pricing Order," issued by Gregory Watson, the Commissioner of the Massachusetts Department of Food and Agriculture (the "Commissioner"). The action is brought by West Lynn Creamery, Inc. and LeComte's Dairy, Inc. under 42 U.S.C. § 1983 and the Commerce Clause of the United States Constitution (Article I, § 8, cl. 3). The basis for this action is that the Commissioner's 1992 Pricing Order, as applied to the plaintiffs, burdens interstate commerce by requiring the plaintiffs to pay funds to Massachusetts milk farmers while out-of-state farmers, the principal source of milk in Massachusetts, receive no funds.

## **PARTIES**

- 2. The plaintiff, West Lynn Creamery, Inc. ("West Lynn") is a Massachusetts corporation with a principal place of business in Lynn, Massachusetts. West Lynn is a milk dealer, licensed by the defendant Commissioner, pursuant to M.G.L. c. 94A, to sell milk in the Commonwealth of Massachusetts. West Lynn purchases raw milk from producers (dairy farmers) and producer-cooperatives. It then processes and packages milk in its processing plant and sells in Massachusetts approximately 60% of the milk it purchases.
- 3. The plaintiff, LeComte's Dairy, Inc. ("LeComte's") is a Massachusetts corporation with a principal place of business in Somerset, Massachusetts. LeComte's sells milk and related dairy products to various retailers, convenience stores, nursing homes, restaurants, etc. It purchases one hundred (100%) percent of its fluid milk products from West Lynn. LeComte's is a milk dealer, licensed by the defendant Commissioner, pursuant to M.G.L. c. 94A, to sell milk in the Commonwealth of Massachusetts.
- 4. The defendant Gregory Watson is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which is charged, *inter alia*, with the regulation of the milk industry in Massachusetts under the provisions of M.G.L. c. 94A. The Commissioner, acting in his official capacity, promulgated and enforces the 1992 Pricing Order which is the subject of this Complaint.

## STATEMENT OF THE CASE

## A. BACKGROUND—THE INTERSTATE NATURE OF COMMERCE IN, AND FEDERAL REGULATION OF, FLUID MILK IN THE NEW ENGLAND STATES

- 5. The dairy industry in the Northeastern United States, including New England, is characterized by substantial interstate movement of fluid milk, both from the dairy farm to the processing/bottling plant, and from the plant to the ultimate consumer. Throughout most of New England (and, indeed, throughout most of the United States), the minimum prices which fluid milk processors ("handlers") must pay to dairy farmers ("producers") or associations of dairy farmers "cooperatives"), are established by federal milk marketing orders promulgated by the United States Secretary of Agriculture (the "Secretary") pursuant to the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 601, et seq., as amended.
- 6. The Secretary has issued and enforced for many years one milk marketing order for virtually all of New England the "New England Federal Milk Marketing Order No. 1" ("Order No. 1"). The Order No. 1 marketing area includes virtually all of Massachusetts, all of Rhode Island and Connecticut, and portions of Vermont and New Hampshire.
- 7. West Lynn is a "handler" regulated by Order No. 1. Accordingly, the minimum payments received by producers or cooperatives supplying milk to West Lynn are determined by the provisions of Order No. 1.
- 8. The pattern of unitary federal minimum producer price regulation reflects the interstate nature of commerce in the milk industry throughout New England. Of the six New England states, only the two most sparsely populated Vermont and Maine are "export states," *i.e.*, dairy farmers within those two states produce far more milk than is consumed therein. This excess milk production is exported across state

lines and sold to handlers who package milk for consumers in the more densely populated New England states. Moreover, a substantial portion of the milk sold to consumers in New England is produced on dairy farms located in the State of New York.

- 9. According to the statistics published by the New England Federal Order Market Administrator, during the year 1991 about 72% of the producer milk received by handlers regulated under Order No. 1 was produced on farms located in Vermont and New York, and a mere 7.8% was produced on Massachusetts dairy farms.
- 10. Because the Commonwealth of Massachusetts contains about 40% of the population within the geographical coverage of Order No. 1, the Commonwealth is a decidedly import state nearly 90% of the milk sold in Massachusetts is produced on dairy farms located within other states (primarily Vermont and New York).
- 11. Beginning in 1933, several states in the Northeast, led by New York, attempted to remedy the perceived problem of inadequate returns to their local dairy farmers through the enactment of state milk control laws.
- 12. To the extent that those state enactments impinged upon interstate commerce (e.g., by attempting to insulate in-state farmers or dealers from competition with lower-priced out-of-state milk), the regulations have been held to violate the Commerce Clause. E.g., Baldwin v. Seelig, 294 U.S. 511 (1935).

## B. THE COMISSIONER'S 1992 PRICING ORDER

13. On January 28, 1992, the Commissioner, citing the Milk Control Law (M.G.L. c. 94A, § 12), declared a state of emergency to exist in the Massachusetts dairy industry. On the basis of that declaration, the Commissioner issued a pricing order on February 18, 1992, which was amended on February

26, 1992 (the "Pricing Order"). A copy of the Findings and Declaration of State of Emergency, and the Pricing Order (as amended), are attached as Exhibits A and B, respectively.

doing business in Massachusetts, including the plaintiffs, whether located in or out of the Commonwealth, to pay into the Massachusetts Dairy Equalization Fund (the "Fund") on a monthly basis an "assessment" based on the amount of Class I milk sold for consumption in Massachusetts, irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers.

15. The amounts paid into the Fund are then distributed monthly by the Commissioner pro nata to Massachusetts dairy farmers only, notwithstanding that most of the milk purchased by West Lynn and sold to consumers in Massachusetts is imported from other states.

16. The Pricing Order issued by the Commissioner:

- (a) establishes a minimum price for raw milk sold in Massachusetts (regardless of where the raw milk is purchased) which is in excess of the minimum price established by the Secretary of Agriculture pursuant to Order No. 1:
- (b) has the same effect as a "customs duty" or "protective tariff" on the importation of milk produced in other states;
- (c) distributes the proceeds of the Fund to dairy farmers located in Massachusetts only;
- (d) subsidizes Massachusetts farmers which causes the disorderly marketing of milk; and
- (e) causes economic harm to out-of-state farmers and to the plaintiffs.
- 17. The Commissioner's Pricing Order is:
  - (a) imposed upon the sale of *all* fluid milk sold to consumers in the Commonwealth; and
  - (b) distributed among a very small percentage of the dairy farmers who produced that milk — only those dairy farmers located within the Commonwealth.

- 18. The Pricing Order requires all licensed milk dealers to file a monthly report and, at the same time, to make the payment into the Fund on or before the 25th day of each month, beginning May 25, 1992, based upon the previous month's Class I milk sales in Massachusetts.
- 19. The Pricing Order also requires the Commissioner to distribute all monies paid into the Fund to Massachusetts milk producers not later than the fifth day of the following month.

## C. IMPLEMENTATION OF THE PRICING ORDER

20. As a result of the express terms of the Pricing Order, the Commissioner has attempted to exact from the plaintiffs, and will continue to exact, an assessment on all of the milk they sell in Massachusetts, although most of this milk is imported as raw milk from other states.

21. Pursuant to the express terms of the Pricing Order, the total annual assessment against West Lynn will amount to more than \$1 million, all of which is to be distributed only to Massachusetts producers despite the fact that 97% of the milk purchased by West Lynn is produced by out-of-state farmers.

22. West Lynn paid \$80,571.85 into the Fund on or about May 25, 1992 for the April Assessment. LeComte's paid \$3,195.54 for its April Assessment. These funds were then distributed by the Commissioner to approximately four hundred eighteen (418) Massachusetts dairy farmers on or about June 15, 1992. No funds were distributed to out-of-state farmers.

23. On June 25, 1992, the Commissioner determined that West Lynn was required to make the "assessment" payment for the month of May pursuant to the Pricing Order. West Lynn objected to making payment and asserted that the Pricing Order burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

- 24. Realizing the practical impossibility of recovering any payments already exacted by the Commissioner and paid over to individual Massachusetts dairy farmers. West Lynn submitted its June 25, 1992 Report, but did not make payment to the Commissioner.
- 25. West Lynn then requested the Commissioner to put funds it would pay under the Pricing Order into an escrow account until the Constitutionality of the Pricing Order could be determined.
- 26. On June 26, 1992 the Commissioner issued a Notice of Hearing, addressed to West Lynn, to suspend or revoke West Lynn's milk dealer's license by reason of its failure to make the June 25, 1992 payments under the Pricing Order. No specific date has been set for that hearing.
- 27. On July 1, 1992, the Commissioner, despite West Lynn's Constitutional objections, ordered West Lynn to make the May payment immediately or he would hold a hearing on the next day which could result in the suspension or revocation of West Lynn's license to sell milk. The Commissioner also decided that the funds from the May payment would not be held in escrow, but would be deposited into the Fund.
- 28. On July 2, 1992, West Lynn, under protest, made payment to the Commissioner in the amount of \$107,201.70 for the May assessment. On June 29, 1992, LeComte's, under protest, made payment to the Commissioner in the amount of \$4,248.63 for the May assessment.
- 29. Upon information and belief, the Commissioner disbursed LeComte's \$4,248.63 amongst 418 Massachusetts farmers on or about July 5, 1992 and West Lynn's \$107,201.70 payment on or about July 15, 1992.

## D. THE NEED FOR INJUNCTIVE RELIEF

- 30. The Commissioner has threatened to impose penalties, including suspension or revocation of the milk dealer's licenses of West Lynn and other dairies, if they do not make payments into the Fund on a timely basis pursuant to the Pricing Order.
- 31. Under Massachusetts law, all persons engaged in the business of purchasing milk from producers, and otherwise handling milk within the Commonwealth, must hold a milk dealer's license, which licenses are issued by the Commissioner annually. It is a violation of M.G.L. c. 94A to sell milk without a valid milk dealer's license.
- 32. Irreparable harm will result to the plaintiffs if the Commissioner is permitted to continue to disburse payments from the Fund to Massachusetts dairy farmers in accordance with the Pricing Order:
  - (a) it does not appear that there is a practical remedy for recovering those monies paid by the plaintiffs from either the Commissioner or the 418 individual Massachusetts dairy farmers once those funds are disbursed; and
  - (b) out-of-state farmers will suffer economic harm if they are placed at a competitive disadvantage, which will result if the Commissioner continues to subsidize Massachusetts farmers while not subsidizing out-of-state farmers.
- 33. Enjoining the Commissioner from enforcing the Pricing Order, from penalizing the plaintiffs, or from suspending or revoking the plaintiffs' milk dealer's licenses is in the interest of consumers, out-of-state farmers and the public interest.
- 34. Any harm to the Commissioner as a result of the issuance of an injunction on the terms requested is outweighed by the irreparable harm to the plaintiffs if their licenses to sell milk are suspended or revoked, or if monies are disbursed from the Fund.

## COUNT I—VIOLATION OF THE COMMERCE CLAUSE

35. The plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 34.

36. The enforcement of the Pricing Order as to the plaintiffs, the exaction of the payments under the Pricing Order from the plaintiffs, and the disbursement of funds to Massachusetts farmers but not out-of-state farmers, constitute a discriminatory, unreasonable and impermissible burden upon interstate commerce.

37. The Pricing Order places out-of-state farmers at a competitive disadvantage because it subsidizes Massachusetts farmers, but not out-of-state farmers, all of whom are selling milk in Massachusetts. Subsidizing Massachusetts farmers, but not out-of-state farmers who compete with Massachusetts farmers, will cause economic harm to out-of-state farmers. The payments by the Commissioner from the Fund to Massachusetts farmers have the same effect as a tariff on out-of-state farmers.

38. Out-of-state farmers may be forced out of business due to the unfair competitive advantage provided to Massachusetts producers as a result of the Commissioner's enforcement of the Pricing Order.

39. Enforcement of the Pricing Order violates the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3.

40. Enforcement of the Pricing Order and the Commissioner's actions pursuant to the Pricing Order constitute the deprivation, under color of state law, of rights guaranteed to the plaintiffs under the United States Constitution, particularly the Commerce Clause and 42 U.S.C. § 1983.

 As a result of the Commissioner's actions, the plaintiffs have been and will be damaged.

## COUNT II - DECLARATORY JUDGMENT

42. The plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 41.

43. As set forth above, the Commissioner, acting under color of state law, has deprived and will deprive the plaintiffs of rights, privileges or immunities secured by the United States Constitution by virtue of his application of the Pricing Order to the plaintiffs.

44. An actual controversy exists as to whether the application of the Pricing Order constitutes a violation of the Commerce Clause of the United States Constitution, as well as 42 U.S.C. § 1983.

45. Declaratory relief, pursuant to M.G.L. c. 231A, is appropriate and proper.

#### RELIEF REQUESTED

WHEREFORE, the plaintiffs request the following relief:

- (1) A declaratory judgment pursuant to M.G.L. c. 231A that the Commissioner's enforcement of the Pricing Order as applied to the plaintiffs violates 42 U.S.C. § 1983 and the Commerce Clause of the United States Constitution under Count I.
- (2) A preliminary injunction enjoining the Commissioner from:
  - (a) attempting to collect from West Lynn and LeComte's the so-called "equalization" assessments provided for under the Commissioner's Amended Pricing Order, dated February 26, 1992; and
  - (b) imposing any penalty, including, but not limited to, suspending or revoking West Lynn's or LeComte's milk dealer's licenses due to their failure to pay the so-called

(3) A permanent injunction:

- (a) making the terms of the preliminary injunction permanent; and
- (b) enjoining the Commissioner from disbursing any money paid into the Massachusetts Dairy Equalization Fund established pursuant to the Commissioner's Amended Pricing Order, dated February 26, 1992.
- (4) For damages pursuant to 42 U.S.C. § 1983 in an amount that this Court may determine after a trial on the merits.
- (5) For reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and
- (6) For a Short Order of Notice ordering the Commissioner to show cause why the second prayer of relief, set forth above, should not be granted.
- (7) For such other and further relief as this Court may deem just and appropriate.

WEST LYNN CREAMERY, INC. and LeCOMTE'S DAIRY, INC.

By their attorneys,

Michael L. Altman BBO #016800 Margaret A. Robbins BBO #559920 Rubin and Rudman 50 Rowes Wharf Boston, Massachusetts 02110 (617) 330-7000

Dated: July 24, 1992

JA55

EXCERPTS FROM
RECORD OF PROCEEDINGS
BEFORE THE
COMMISSIONER RE:
WEST LYNN CREAMERY, INC.

VOL. I PAGES 1-102 EXHIBITS See Index

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE

RE: WEST LYNN CREAMERY, INC.

Administrative Docket No. MD-9347

BEFORE: Gregory C. Watson, Commissioner

Dept. of Food & Agriculture 100 Cambridge Street Boston, Massachusetts Monday, September 14, 1992 1:20 p.m.

#### **JA57**

#### APPEARANCES:

James Hines, Director of Agricultural Development, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Tara Zadeh, General Counsel, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Rubin & Rudman (Michael L. Altman, Esq. and Margaret Robbins, Esq.), 50 Rowes Wharf, Boston, Massachusetts 02110, for West Lynn Creamery, Inc.

#### Also Present:

Arthur J. Pappathanasi Walter J. Boverini Edward J. Clancy Nancy Young Lucille Andrew

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[p. 413] MR. WATSON: And the issue being the delayed payment and the failure to pay?

MR. HINES: The delayed payment and failure to pay in violation of the program. I also want to bring up —

MR. ALTMAN: Wait, wait Violation of the program? My understanding is the only violations are the fact that we paid the June 25th payment on July 2nd. We will stipulate to that. And we've told Mr. Hines and we've told the Commissioner the reason we didn't pay is because we believe that the order violates the Commerce clause of the United States Constitution, and that it would be illegal to compel us to pay it.

The same comment goes for the payment that was due on July 25th and for August 25th. We acknowledge — There's no dispute we didn't pay it. We've offered to put it in escrow, and that's been rejected, but we didn't pay it. That's why we're here, right?

\* \*

[p. 441] MR. ALTMAN: Well, the policy of the Department is to distribute 100 percent of the funds that are paid into the equalization fund pursuant to the pricing order.

MR. HINES: That is correct.

MR. ALTMAN: And certainly in the first few months, that's what has been done.

MR. HINES: That is correct. The policy is to pay and then to rebate any amounts left over — once the requirement is met — back to the individual dealers.

\* \* \*

[p. 445] And what's happened is with this pricing order going into effect, we attempted to pass on these costs. We're not going to hide the fact that we attempted to pass it on to all our customers. But the facts in the marketplace is that it's very, very [p. 446] competitive out there, and I think if you called in every other dairy in the industry for testimony on this, I think they'd bear me out.

That every month we are giving up some of that tax that we're passing on, and we see our margins eroding. If you look in the month of March, we have margins of a certain amount of sets per unit. We can supply you with this information. In April those margins began to deteriorate slightly per unit. In May they deteriorated more. In June they deteriorated more. In July they deteriorated some more.

So at the present time we've absorbed roughly 50 percent of that tax that is being assessed. So at the present time it's costing us anywhere between \$30,000 and \$50,000 a month out of our margins and our profits to fund this tax payment.

MR. WATSON: Is that because you're holding it in escrow?

MR. PAPPATHANASI: No. What I'm saying is that we are only collecting from our customers only 50 percent of the

money at this time. We're putting in escrow 100 percent of the money. So 50 percent of the money is money we've received from customers. The other 50 percent is money we're receiving that we're putting in right out of our own profits.

[p. 448] MR. ALTMAN: Do I understand you purchase 98 percent of the milk that you sell in Massachusetts from out-of-state farmers, is that correct?

MR. PAPPATHANASI: That's correct, yes.

MR. ALTMAN: And some other dairies that you compete with purchase higher percentages from Massachusetts dairies, is that correct?

MR. PAPPATHANASI: That's correct, yes.

MR. ALTMAN: So you see, I mean when you talk about competitive advantages and disadvantages, Massachusetts farmers are getting \$15 hundredweight whereas New York and Vermont farmers are not, and so this is hurting West Lynn Creamery which is purchasing from out-of-state dairies in their efforts to compete with dairies who get a greater percentage of their milk from in-state, and that also in part explains why some

[p. 458] Mr. ALTMAN: I have two other documents that I want to give you.

MR. WATSON: Okay.

MR. ALTMAN: This also is I believe attached to the memorandum. We're at what, Exhibit DD?

Ms. ZADEH: Yes.

MR. WATSON: DD.

(Average Milk Prices Per Hundredweight from January to June 1992 was marked Exhibit DD.)

MR. ALTMAN: Basically I had this document put together based on data from the New [p. 459] England Agricultural Statistics Service.

\* \* \*

[p. 460] MR. HINES: The column 1, the average price received by Massachusetts farmers, for example in July you're saying \$16.70. Are you taking into consideration the blend price or taking into consideration Class I?

MR. ALTMAN: That's the New England Agricultural Statistics Service, and if you want to call them you can verify these numbers. They compile from the farmers information on how much they are being paid for milk, and that's the reported price that was made available from that service. That's all I can say.

MR. WATSON: So we don't know if it's blend or Class

I. Okay. We'll note that for the record.

MR. PAPPATHANASI: Ours is blend, column 2.

MR. WATSON: Clearly the West Lynn, column 2, is blend.

MR. PAPPATHANASI: Yes.

MR. WATSON: And there is clearly zone 1 [p. 461] blend price. But it's not clear as whether or not the average price received by Mass. farmers, column 1, refers to the blend or the Class I price. So we'll just note that.

MR. ALTMAN: It refers to the price that they received.

MR. PAPPATHANASI: Which would be blend.

MR. ALTMAN: There's only one price that they received for raw milk.

MR. PAPPATHANASI: They receive the blend. They don't receive the Class I.

MR. ALTMAN: I mean, they're just paid for milk and then broken down afterwards into Class I, Class II, Class III.

MR. ALTMAN: So the final document is EE. There's an extra copy if you want to look at it.

MR. WATSON: Thanks.

(Data from Mass. Dept. of Agriculture Provided Pursuant to General Laws Chapter 66, Section 10, was marked Exhibit EE.)

MR. ALTMAN: And basically what this is as follows. I made an FOI request, freedom of information request, to the Department to give me the [p. 462] information included on Exhibit EE, and what I was supplied with was that data.

The amount of milk produced in Massachusetts in April, May, and June; the amount of milk sold in Massachusetts in April, May, and June; the total paid to farmers in each of those months; and then I have the premiums that were paid out in four months. The Department hasn't yet given me the information for July to fill in there.

## EXCERPTS FROM RECORD OF PROCEEDINGS BEFORE THE COMMISSIONER RE: LECOMTE'S DAIRY, INC.

VOL. I PAGES 1-20 EXHIBITS See Index

## COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

RE: LECOMTE'S DAIRY
Administrative Docket No. MD-9346

BEFORE: Gregory C. Watson, Commissioner

Dept. of Food & Agriculture 100 Cambridge Street Boston, Massachusetts Monday, September 14, 1992 3:40 p.m.

#### APPEARANCES:

James Hines, Director of Agricultural Development, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Tara Zadeh, General Counsel, Department of Food and Agriculture, 100 Cambridge Street, Boston, Massachusetts 02202;

Rubin & Rudman (Michael L. Altman, Esq. and Margaret Robbins, Esq.), 50 Rowes Wharf, Boston, Massachusetts 02110, for LeComte's Dairy.

#### Also Present:

Arthur J. Pappathanasi Lucille Andrew

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[p. 820] It is keeping those funds segregated. The only reason it didn't make the payments on June 25th and July 25th is that it believes on advice of counsel that the 1992 pricing order is a violation of the Constitution, the Commerce clause.

#### **JA65**

## AFFIDAVIT OF ARTHUR J. PAPPATHANASI SUBMITTED TO THE COMMISSIONER

Arthur J. Pappathanasi declares under the penalties of perjury that the following facts are true:

1. I am the President and Chief Executive Officer of West Lynn Creamery, Inc. ("West Lynn").

2. West Lynn did not make timely payment of the Assessment due on June 25, 1992 because West Lynn believed that the Pricing Order, as applied, is unconstitutional. On July 1, West Lynn paid the Assessment under protest and under threat of facing an immediate hearing to revoke its license.

3. West Lynn did not include payment with the July 25, 1992 report. West Lynn did not pay the assessment due on July 25, 1992 because West Lynn believed that the Pricing Order, as applied, is unconstitutional.

4. West Lynn has offered, and continues to offer, to pay all assessments into an escrow account to be held until the court determines whether the Pricing Order is unconstitutional. It is West Lynn's understanding that the Commissioner has refused to agree to the deposit of the assessments into an escrow account.

5. West Lynn stands ready, willing and able to pay all assessments that are finally determined to be constitutional by the courts.

6. A true copy of the Complaint, filed in the Suffolk Superior Court, challenging the constitutionality of the Pricing Order is attached to this Affidavit. Memoranda supporting West Lynn's claim that the Pricing Order is unconstitutional have been supplied to counsel for the Commissioner, Eric Smith, beginning in mid-July of 1992. Another Memorandum is being submitted with this Affidavit.

7. If the Commissioner were to suspend or revoke West Lynn's license to sell milk, this would have a serious effect on West Lynn. It is illegal to sell milk without a license. If West Lynn were to sell milk without a license, it would be subject to criminal penalties. On the other hand, if West Lynn were to stop selling milk as a result of a license suspension or revocation, West Lynn would suffer a substantial economic loss and we would have to consider laying off hundreds of employees from their jobs. West Lynn sells milk to approximately 12,000 customers. These customers include school districts, nursing homes, restaurants, convenience stores, etc. If we could not sell milk to these thousands of customers, thousands of people would be harmed and the market would be substantially disrupted. If West Lynn could not sell milk, it would have to stop buying milk from farmers and this would harm those whom the Commissioner is attempting to economically assist.

- 8. Even a short suspension of West Lynn's license to sell milk would have disastrous consequences because customers depend upon a regular delivery of milk. To disrupt the delivery of milk for a short time has the potential to cause short term hardship for customers; it also could lead to the permanent loss of those customers who may prefer to do business with a dealer who has not had its licensing in jeopardy.
- West Lynn believes that if it pays the assessments due into the Fund there is not a practical remedy for obtaining a return of the Funds from the Commissioner, the Commonwealth or the farmers.
- 10. Data supplied by the Commissioner's office shows that not more than 35 percent of the milk sold in Massachusetts is produced on Massachusetts farms. I believe that only about ten percent of the fluid milk sold in Massachusetts is produced on Massachusetts farms. West Lynn purchases about 98 percent of its milk from non-Massachusetts farmers mostly from New York and Maine. Therefore, the burden of the Pricing Order falls disproportionately on West Lynn and its producers. Those producers compete with Massachusetts farmers and they

can't compete effectively against Massachusetts farmers who are receiving thousands of dollars under the Pricing Order.

11. I have reviewed West Lynn's prices and sales for the past two years. My conclusion is that the Pricing Order is seriously eroding profits. Moreover, while initially West Lynn attempted to pass on most of the Pricing Order to its customers, the market has made it impossible to do so. I estimate that we have only been able to pass on one-third to one-half of the Pricing Order to our customers.

SIGNED UNDER THE PENALTIES OF PERJURY THIS 3RD DAY OF SEPTEMBER, 1992.

Arthur J. Pappathanasi

### AFFIDAVIT OF DR. RONALD D. KNUTSON REGARDING IMPACTS OF MILK TAX ON INTERSTATE COMMERCE

The purpose of this affidavit is to evaluate the impact of the 1992 milk "Pricing Order" on interstate commerce. I understand that the "Pricing Order" was issued by the Commissioner of the Massachusetts Department of Food and Agriculture. I have studied the content of the "Pricing Order" as issued on February 26, 1992, and the Findings and Declaration of Emergency that was issued by the Commissioner on January 28, 1992. In addition, I have studied data issued by the Department of Food and Agriculture as well as other data on the New England Federal Order Market as issued by the Federal Market Administrator. Specific data utilized to support particular conclusions are referenced throughout the affidavit.

My qualifications for addressing the issue of the impacts of the "Pricing Order" on interstate commerce arise from over 30 years of experience as a researcher in the economics of the dairy industry and government policy regarding agriculture, including the dairy industry. Of specific relevance is my training in the field of agricultural economics at the University of Minnesota and at the Pennsylvania State University. During this training and subsequently in my research, I have studied the economic effects of what states have done to improve the position of their milk producers. It is because of the adverse effects of local intervention that we have institutions such as Federal Milk Marketing Orders.

In my current position as Director of the Agricultural and Food Policy Center at Texas A&M University, studies are regularly done upon the request of members of Congress for the purpose of analyzing the impacts of policy changes on the dairy industry as well as on other agricultural industries. Much of our research on the dairy industry has involved analyzing of the impacts of changes in dairy policy on the survival of dairy farms in different parts of the United States including the Northeast and New England.

There should be no doubt that dairy farms in the Northeast are in an intense competitive struggle. In fact, the whole dairy industry is undergoing competitive forces that are precipitating momentous structural change toward fewer but larger dairies. During the late 1980s, milk producers in Massachusetts found themselves in a difficult competitive situation while land values were increasing at double digit rates.2 With relatively tight margins many farmers decided to sell their dairy farms. When land prices leveled out and declined in 1989-1992, farmer exits slowed greatly. There was no longer as strong an incentive to sell. Yet the competitive pressure on milk producers continued. That pressure is toward large scale dairies having 200 or more milking cows — in California and Western New York, the number is 500 cows or more. The average size of dairy herds in Massachusetts, based on Federal Order Market Administrator data, is about 70 cows.3 Further consolidation of farm operations is inevitable over the long run regardless of what the Commonwealth of Massachusetts does in terms of short-run policy. Economic recovery will once again provide the incentives for consolidation and exit from dairy farming.

From a practical perspective, it should not make any difference to any nonresident if Massachusetts wants to tax its citi-

A copy of my resume is attached.

<sup>&</sup>lt;sup>2</sup>World Agricultural Outlook Board, "Agricultural Resources: Agricultural Land Values," Situation and Outlook Summary, (Washington, D.C.: Economic Research Service/USDA, April 22, 1992), pp. 3-4. Fred Cale and David Henderson, Estimating Entry and Exit of U.S. Farms, Staff Report AGES 9119, (Washington, D.C.: Economic Research Service/USDA, March 1991).

<sup>&#</sup>x27;Market Administrator, New England Milk Market Statistics for the Year 1991, (Boston, MA: Federal Order No. 1, 1992), pp. 4-6. Assumes an output per cow of 15,000 pounds which approximates the Massachusetts average.

zens for the purpose of protecting its milk producers as long as no one else is injured. However, in this case the pricing order causes economic harm to milk producers who operate in other states, to Massachusetts milk processors, and to consumers. All of these injuries are directly related to interference with interstate movement of milk and its products at competitive prices. The remainder of this affidavit explains the nature and extent of that injury.

#### **Producer Injury**

Injury to producers located outside Massachusetts results from interference with interstate movement of milk in four respects:

• The milk out-of-state producers sell in interstate commerce to Massachusetts processors who, in turn, sell to Massachusetts retailers and consumers was taxed<sup>5</sup> at an average rate of \$0.66/cwt in April 1992, \$0.93/cwt in May 1992, and \$0.74/cwt in June 1992. The effect of this tax has been to reduce the flow of raw (producer) milk into Massachusetts because the retail price increase to consumers reduces the demand for milk. In other words, as local (Massachusetts) demand for milk decreases, a larger proportion of the out-ofstate milk that would have been imported into Massachusetts for fluid use is diverted to manufacturing plants located in proximity to where the milk is produced. As this happens, the blend price received by producers falls. While Massachusetts producers tend to be shielded from this blend price decline by the tax, out-of-state producers have no shield. Their blend price falls.

Prior to the imposition of the tax, the retail price of milk in Massachusetts generally ranged from about \$1.99 per gallon to \$2.49 per gallon. Based on a retail milk price of \$2.29/gallon, consumption of milk in Massachusetts declined by 970,413 pounds in April; 1,382,386 pounds in May; and 1,066,539 pounds in June from the level of consumption that would have existed in the absence of the tax. Appendix A indicates the details of the computational procedures. Appendix B indicates the impacts on demand of consumer price levels ranging from \$1.99-2.49 per gallon in \$0.10 per gallon increments. The same procedures are utilized in arriving at these demand impacts as in Appendix A. Over the three month period, based on a retail price of \$2.29 per gallon, 3,419,338 pounds of milk were displaced from interstate commerce by virtue of the higher consumer price alone (Table 1). This occurs because Massachusetts processors cannot sell as much milk at the higher price. If these pricing conditions existed throughout the year, 13.7 million pounds of milk would be displaced from interstate commerce due to the higher price. The displacement of out-of-state milk from interstate commerce occurs because of the preference given to locally produced milk due to lower transportation costs and the unwillingness of processors to receive any more milk than is needed.

• The second source of injury to out-of-state producers occurs because Massachusetts producers will increase milk production in response to the higher milk price. This increased production displaces milk that would otherwise be sold to Massachusetts processors by out-of-state producers. In contrast with milk consumers who immediately reduce consumption in response to a higher price, milk producers respond over a longer time frame. Economists normally analyze producer response over a short-run period of a year and a long-run period of three years or more.

<sup>&</sup>lt;sup>4</sup>The term "processor" as used in this affidavit refers to milk dealers as that term is defined in the 1992 Pricing Order.

<sup>&#</sup>x27;The terms tax or taxed are used in this affidavit to refer to the assessments imposed by the Commissioner.

Extensive research on the supply response of milk producers indicates that, in the short run, for each 1 percent increase in the price of milk, production increases by 0.30 percent. This same research indicates that in the long run a 1 percent increase in the price of milk increases production by 1 percent. The reason for the difference in responsiveness is that it generally takes a period of about three years for farmers to add cows to their herds.

As in the case of the demand impacts, Appendix A also indicates the computational procedures for determining the supply impacts for each month, April-June 1992. Appendix C summarizes the increases in supply that would be expected for each month if extended over the respective short-run and long-run time periods. It is not appropriate to sum these responses as in the case of demand; rather they need to be averaged. This assumes that roughly the same average magnitude of tax would exist over the period of a year. Under this assumption, milk production in Massachusetts would increase by 1,751,939 pounds in the short-run. If this tax were maintained over the long-run, Massachusetts producers would respond by increasing milk production by 5,838,446 pounds.

It may be concluded that on an annual basis, the reduced flow of milk in interstate commerce would total 13.7 million pounds due to reduced demand, plus 1.8 million pounds due to increased supply, or 15.5 million pounds in total. By all standards, this represents a substantial quantity of milk and would be even larger extended over a longer time period.

• The third source of adverse injury to producers results from the potential for the Massachusetts milk tax to undermine the premiums paid by processors to producers located in states other than Massachusetts. When the demand for Massachusetts

milk falls, or the supply increases, out-of-state milk handlers (cooperative or investor-owned) must find another home for this raw milk. The competition involved in finding that home for milk reduces the potential for obtaining premiums on milk sold by out-of-state producers. In other words, when milk is plentiful, it is more difficult to negotiate premiums, and the price of raw milk, therefore, falls. Of course, this decline in premiums is compounded by the decline in blend price received by out-of-state producers that results from the reduced demand for Class I milk and the increased utilization of milk for manufacturing uses.

• The fourth source of injury to producers results from out-of-state milk producers receiving a lower price for their milk than Massachusetts producers. The result is an inherent discrimination against out-of-state producers. As a result of not receiving the Massachusetts distribution of tax proceeds, out-of-state producers are placed at a disadvantage competing in the market for milk. Conversely, Massachusetts producers have an inherent advantage that gives them a competitive edge in a market that has been determined under the New England Federal Milk Marketing Order to be broader than Massachusetts.

#### **Processor injury**

Injury to Massachusetts processors results from economic effects and incentives built up by interference with the interstate movement of milk in three respects:

• As a result of the tax, a higher price is paid by processors for raw milk. Some of this higher price is being passed on to consumers who, as has been seen, react by purchasing less milk. The reduced sales increase the processors' unit costs of doing business. Many of the costs involved in processing milk are fixed. Reduced sales mean that those fixed costs cannot be spread over as large a volume. Thus unit processing and distribution costs rise.

<sup>&</sup>lt;sup>6</sup> While milk prices are quite cyclical, the months of April-June are likely to be quite representative of the annual average with typically higher market prices in September-December and lower prices in the late winter and early spring.

• Processors are also adversely affected by distortions in their route structure and by increased competition for consumer sales from out-of-state sources of supply. It should not be a surprise to anyone that consumers buy milk on the basis of price. Since Massachusetts is a relatively small state, many of its consumers have access to milk from an adjoining state.

Just as Canadian consumers drive across the border to buy lower priced milk in the United States, Massachusetts consumers can be expected to do likewise. The result is the need for dealers to continuously adjust their route structure in response to shifting demand. Such adjustments are costly. Moreover, once the tax is abandoned, further adjustments will be required.

 Strong economic incentives are provided for Massachusetts buyers of processed milk at the wholesale level to purchase their milk needs from out-of-state processors at lower prices. In contrast with the past when there was a close longer-term working relationship between processors and wholesale buyers of milk, today milk is increasingly being sold on a spot sale basis — often in truckload lots but even in less than truckload lots. While this type of spot sale is occurring throughout the United States, the Massachusetts milk tax generates strong economic incentives for such spot sales. The out-of-state processor can make a one-time COD sale of milk at a favorable price (perhaps higher than could be obtained from its regular customers) and the Massachusetts buyer could purchase the milk at a lower price than from a Massachusetts processor who was required to pay the milk tax.

I have examined the sales of West Lynn Creamery and have found that these anticipated adverse impacts are apparent from their records during the months of April-July 1992, compared with a year earlier. Specifically, West Lynn's sales volume has been substantially reduced during the months of April-August 1992 compared with the same months of 1991. Comparable reductions of the same magnitude were not experienced in January-March 1992. In other words, the gap in sales between comparable months of 1991 and 1992 appears to be widening.

#### Consumer Injury

The primary consumer impact is in the higher price that must be paid for Massachusetts milk. This impact falls the heaviest on the poorest families, particularly those having a large number of children. With the overall economic downturn, more unemployment, reduced hours worked and reduced incomes, questions can be raised regarding the logic in and justification for a milk tax.

Signed under the penalties of perjury this 3rd day of September, 1992.

Ronald D. Knutson

Table 1. Pounds of Milk Displaced From Interstate Commerce by Milk Tax, April 1992-June 1992

Pounds displaced by reduced demand	
—April	970,413
—May	1,382,386
—June	1,066,539
Total reduced demand	3,419,338
Pounds displaced by increased supply	
—Short-run <sup>1</sup>	1,751,939
-Long-run <sup>2</sup>	5,838,446

#### Appendix A

#### Impact of Milk Processor Tax on Milk Demand and Supply April 1992

#### Milk Demand

Milk sold in Massachusetts (cwt)	1,105,731.47
Tax Receipts	\$726,069.41
Average tax/cwt	\$0.66
Average tax/gallon	\$0.057
Assumed milk price	\$2.29
Percent milk price increase	2.49
Demand elasticity	-0.35
Percent reduction in demand	0.87
Pounds milk sold in Massachusetts	110,573,147.0
1-percent reduction in demand (1-0.0087)	0.9913
Pounds milk that would have been sold	111,543,560.0
Reduction in fluid milk sales (pounds)	970,413.0

#### Milk Supply

Milk produced in Massachusetts (cwt)	385,335.45
Tax distributed	\$727,337.00
Distribution/cwt	\$1.89
Price received by Massachusetts producers	\$15.80
Price received without distribution/cwt	\$13.91
Percent increase in Massachusetts price	13.59
Short-run supply elasticity	0.30
Short-run percent increase in production	4.08
Short-run increase in production	1,572,169.00
Long-run supply elasticity	1.0
Long-run percent increase in production	13.59
Long-run increase in production	5,236,709.0

Impact assumes program operates over a one-year period.

<sup>&</sup>lt;sup>2</sup>Impact assumes program operates over a three-year period.

#### Appendix A

Impact of Milk Processor Tax on Milk Demand and Supply May 1992

#### Milk Demand

Milk sold in Massachusetts (cwt)	1,119,283.74
Tax Receipts	\$1,043,856.00
Average tax/cwt	\$0.93
Average tax/gallon	\$0.080
Assumed milk price	\$2.29
Percent milk price increase	3.49
Demand elasticity	-0.35
Percent reduction in demand	1.22
Pounds milk sold in Massachusetts	111,928,374.0
1-percent reduction in demand (1-0.0122)	0.9878
Pounds milk that would have ben sold	113,310,760.0
Reduction in fluid milk sales (pounds)	1,382,386.0

#### Milk Supply

Milk produced in Massachusetts (cwt)	399,684.39
Tax distributed	\$979,151.00
Distribution/cwt	\$2.45
Price received by Massachusetts producers	\$16.30
Price received without distribution/cwt	\$13.85
Percent increase in Massachusetts price	17.69
Short-run supply elasticity	0.30
Short-run percent increase in production	5.31
Short-run increase in production	1,122,324.00
Long-run supply elasticity	1.0
Long-run percent increase in production	17.69
Long-run increase in production	7,070,417.0

#### **JA79**

#### Appendix A

Impact of Milk Processor Tax on Milk Demand and Supply
June 1992

#### Milk Demand

Milk sold in Massachusetts (cwt)	1,077,643.71
Tax Receipts	\$792,561.70
Average tax/cwt	\$0.74
Average tax/gallon	\$0.064
Assumed milk price	\$2.29
Percent milk price increase	2.79
Demand elasticity	-0.35
Percent reduction in demand	0.98
Pounds milk sold in Massachusetts	107,764,371.0
1-percent reduction in demand (1-0.0098)	0.9902
Pounds milk that would have been sold	108,830,910.0
Reduction in fluid milk sales (pounds)	1,066,539.0

#### Milk Supply

Milk produced in Massachusetts (cwt)	379,884.19
Tax distributed	\$754,134.00
Distribution/cwt .	\$1.99
Price received by Massachusetts producers	\$16.50
Price received without distribution/cwt	\$14.51
Percent increase in Massachusetts price	13.71
Short-run supply elasticity	0.30
Short-run percent increase in production	4.11
Short-run increase in production	1,561,324.00
Long-run supply elasticity	1.0
Long-run percent increase in production	13.71
Long-run increase in production	5,208,212.00

#### Appendix B

Impact of the \$0.07 Per Gallon Milk Processor Tax on the Quantity of Milk Demanded Under Alternative Retail Milk Prices.<sup>1</sup>

	Milk Demand Reduction			
Milk Price	Monthly	Annual		
(dollars)	(por	(pounds)		
1.99	1,369,840	16,438,080		
2.09	1,302,230	15,626,760		
2.19	1,245,950	14,951,400		
2.29	1,189,730	14,276,760		
2.39	1,144,790	13,737,480		
2.49	1,088,660	13,063,920		

#### **JA81**

#### Appendix C

Pounds of Milk Displaced From Interstate Commerce by the Milk Tax, by Month.

Milk Tax, by Month.	•
April 1992	
-Short-run displacement	
-Demand decrease	970,413
-Supply increase	1,572,169
-Total short-run displacement	2,542,582
-Long-run displacement	
-Demand decrease	970,413
-Supply increase	5,236,709
-Total long-run displacement	6,207,122
May 1992	
-Short-run displacement	
-Demand decrease	1,382,386
-Supply increase	2,122,324
-Total short-run displacement	3,504,710
-Long-run displacement	
-Demand decrease	1,382,386
-Supply increase	7,070,417
-Total long-run displacement	8,452,803
June 1992	
-Short-run displacement	
-Demand decrease	1,066,539
-Supply decrease	1,561,324
-Total short-run displacement	2,627,863
-Long-run displacement	
-Demand decrease	1,066,539
-Supply increase	5,208,212
-Total long-run displacement	6,274,751

Based on assumed milk sales of 110,000,000 pounds of milk per month.

# DATA FROM MASSACHUSETTS DEPARTMENT OF AGRICULTURE PROVIDED PURSUANT TO G.L. CH. 66, § 10

Month	Mass. Premium	Mass. Milk Produced <sup>2</sup>	Class I Sold/Mass. <sup>2</sup>	Total Paid To Farmers
April	\$2.14	38,533,545	110,573,147	\$727,3374
May	\$2.80	39,968,439	111,928,374	\$979,1515
June	\$2.48	37,988,419	107,764,371	\$754,1346
July	\$2.48			

### AVERAGE MILK PRICES PER HUNDREDWEIGHT FROM JANUARY TO JUNE 1992

Month (1992)	Average Price Received by MA Farmers'	Average Price Paid to Farmers by WLC <sup>2</sup>	Zone 1 Blend Price
January	\$14.50	\$14.53	\$14.03
February	\$14.00	\$14.08	\$13.58
March	\$13.40	\$13.43	\$12.92
April	\$15.80	\$13.49	\$13.24
May	\$16.30	\$13.49	\$13.24
June	\$16.50	\$14.05	\$13.81
July	\$16.70	\$14.35	\$14.10

<sup>&</sup>lt;sup>1</sup>The difference between the Zone 21 blend price and \$15.00.

<sup>&</sup>lt;sup>2</sup>Total Class I milk sold in Massachusetts as reported by Dealers on the Report forms filed with the Department.

<sup>&#</sup>x27;Total amounts paid to Massachusetts farmers each month from Equalization Fund per the Pricing Order.

<sup>&</sup>lt;sup>4</sup>No rebate in April.

<sup>&#</sup>x27;\$1,043,856 was received; the excess is to be rebated to Dealers per the Pricing Order.

<sup>&</sup>quot;\$792,561.70 was received; the difference between paid and received will be disbursed in the future.

Data from New England Agricultural Statistics Service. Includes Premium paid per the Pricing Order.

<sup>&</sup>lt;sup>2</sup> Price is for raw milk; packaging not included. Includes premium for quality and quantity. Prices do not include hauling charges. Data supplied by West Lynn Creamery (WLC).

IN THE MATTER OF:

ADMINISTRATIVE DOCKET NOS: MD-9202, MD-9301, MD-9347

Arthur Pappathanasi President West Lynn Creamery, Inc. 626 Lynnway Lynn, MA 01905

#### DECISION

Re: Dealer Name: West Lynn Creamery, Inc. Revocation of Milk Dealer License No: 191

#### INTRODUCTION

1. This decision is rendered after a full and fair hearing held in order to determine if there is cause to suspend or revoke the milk dealer's license of West Lynn Creamery, Incorporated. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that West Lynn Creamery, Inc., failed to comply with the Commissioner's Amended Pricing Order.

#### **JURISDICTION**

2. The Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

#### **PARTIES**

3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Common-

wealth of Massachusetts acting pursuant to the provisions of M.G.L. c. 94A, the Massachusetts Milk Control laws.

4. West Lynn Creamery, Inc., (hereafter "West Lynn") is a company with a principal place of business located at 626 Lynnway, Lynn, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

#### **FINDINGS**

- A show cause hearing was held on September 14, 1992 to determine whether there was sufficient cause to suspend or revoke West Lynn's Massachusetts milk dealer's license.
- 6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9347, MD-9301, and MD-9202 dated September 9, 1992, incorporating by reference the earlier notices received by West Lynn, was received by West Lynn on September 9, 1992.
- 7. Based upon the testimony presented at the hearing, the following facts are found:

#### Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.

- 9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including West Lynn.
- 10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

#### **Violations**

- 11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month...", following the monthly reporting period.
- 12. On July 2, 1992, the Department received a May Monthly Reporting Schedule and required payment from West Lynn, due for the month of June. Pursuant to the Order, the May Monthly Reporting Schedule was due on June 25, 1992. West Lynn failed to attach the list of sales to other dealers and the May 1992 Federal Market Administrator's Form No. 1, as required by the Order.
- 13. On July 24, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on July 25, 1992. West Lynn failed to attach the list of sales to other dealers and the June 1992 Federal Market Administrator's Form No. 1, as required by the Order.

- 14. On August 26, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from West Lynn, due for the month of July. Pursuant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992, however, the Department considered that the Schedule was timely filed.
- 15. On August 31, 1992, West Lynn submitted amended Reporting Forms for the months of June and July, as well as the May, June and July Federal Market Administrator's Form No. 1, as required.
- 16. As of the date of the hearing, West Lynn failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.
- 17. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, West Lynn has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).
- 18. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.
- 19. West Lynn's failure to comply with the Order was a significant factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.

- 20. West Lynn contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.
- 21. The defense offered by West Lynn fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.
- 22. It appears that West Lynn bases its Commerce Clause defense on alleged discrimination between in-state producers and out-of-state producers. Assuming, without deciding, that West Lynn has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.
- 23. West Lynn's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the record. This claim is based on the underlying assumption that Massachusetts farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly de-

creased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause the premiums paid to out-of-state farmers to decline is not supported by the evidence.

24. West Lynn also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

#### CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

- I. The milk dealer's license of West Lynn Creamery, Inc. is hereby revoked, effective on the fourteenth day following receipt of this decision, unless prior to that date West Lynn complies with the following:
  - A. files a completed monthly reporting schedule and submits an accompanying payments for the month of July, 1992; and
  - B. files completed monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

#### RIGHT TO APPEAL

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(f).

#### EFFECTIVE DATES AND PARTIES BOUND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.

Signed this 16th day of November, 1992.

GREGORY C. WATSON COMMISSIONER

### IN THE MATTER OF:

ADMINISTRATIVE DOCKET NOS: MD-9303 and MD-9346

President LeComtes/All Start Dairy, Inc. PO Box 57/500 Wood Street Somerset, MA 02726

#### DECISION

Re: Dealer Name: LeComtes/All Star Dairy, Inc. Milk Dealer License No.: 114

#### INTRODUCTION

1. This decision is rendered after a hearing held in order to determine if there is cause to suspend or revoke LeComtes/All Star Dairy, Inc.'s milk dealer's license. As a result of the hearing and investigation conducted by the Commissioner, it has been determined that LeComtes/All Star Dairy, Inc., failed to comply with the Commissioner's Amended Pricing Order.

#### JURISDICTION

2. The Department of Food and Agriculture (the "Department") is authorized to issue this decision pursuant to the provisions of M.G.L. c. 94A §§ 6 and 7.

#### **PARTIES**

- 3. The Massachusetts Department of Food and Agriculture is a duly authorized administrative agency of the Commonwealth of Massachusetts acting pursuant to the provisions of M.G.L.
- c. 94A, the Massachusetts Milk Control laws.

4. LeComtes/All Start Dairy, Inc. (hereafter "Respondent") is a corporation which operates as a milk dealer, with a place of business in Somerset, Massachusetts, and is a milk dealer licensed by the Department to deal milk in Massachusetts.

#### **FINDINGS**

- 5. A show cause hearing was held on September 14, 1992 in order to determine whether there was sufficient cause to suspend or revoke Respondent's Massachusetts milk dealer's license.
- 6. The Notice of Hearing, rescheduling the show cause hearing for Administrative Docket Nos. MD-9346 and MD-9303, dated September 9, 1992, incorporating by reference the earlier notices received by Respondent, was received by Respondent on September 9, 1992.
- 7. Based upon the testimony presented at the hearing, the following facts are found:

#### Background

8. In response to a petition delivered to the Department of Food and Agriculture pursuant to G.L. c. 94A § 12 on November 13, 1992, and requesting that hearings be held regarding the state of the dairy industry in Massachusetts and that a state of emergency be declared, and also pursuant to the Commissioner's authority under G.L. c. 94A §§ 10 and 11, investigatory hearings were held by the Department in January of 1992. The findings of those hearings are reported in the "Findings and Declaration of State of Emergency in the Massachusetts Dairy Industry", dated January 28, 1992.

- 9. On February 18, 1992, the Commissioner issued a Pricing Order which was clarified and reissued as an "Amended Pricing Order" on February 26, 1992 (the "Order"). A copy of the Order was provided to each licensed milk dealer including Respondent.
- 10. The Order requires milk dealers to make payments to the Dairy Equalization Fund and to submit a monthly reporting schedule to the Department for each monthly period, commencing with April, 1992.

#### **Violations**

- 11. Pursuant to Paragraph IV of the Order, "Every milk dealer shall submit a completed Monthly Reporting Schedule, all required attachments and payment, to the Department on or before the twenty fifth (25th) day of the month...", following the monthly reporting period.
- 12. On June 29, 1992, the Department received a May Monthly Reporting Schedule, with the required payment, from Respondent, due for the month of May. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on June 25, 1992.
- 13. On July 25, 1992, the Department received a June Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of June. Pursuant to the Order, the June Monthly Reporting Schedule and payment were due on July 25, 1992.
- 14. On August 4, 1992, the Department received a July Monthly Reporting Schedule, without the required payment, from Respondent, due for the month of July. Pur-

suant to the Order, the July Monthly Reporting Schedule and payment were due on August 25, 1992.

- 15. As of the date of the hearing, Respondent failed to submit the payments required by the Order for the month of June, due by July 25, 1992 and the month of July, due August 25, 1992.
- 16. By failing to comply with the terms of the Pricing Order during the months of June, July and August, 1992, through the date of the hearing, Respondent has violated an order of the Commissioner warranting action pursuant to G.L. c. 94A § 6(13).
- 17. During the months of August and September, the Department was unable to disburse payments amounting to one hundred percent of the target price to the Massachusetts dairy farmers, as intended by the Order, since the amount in the Dairy Equalization Fund was not sufficient to permit disbursements of the target amount.
- 18. Respondent's failure to comply with the Order was a contributing factor in the Department's failure to return one hundred percent of the target price to the Massachusetts dairy farmers.
- 19. Respondent contends that the company's failure to pay is based on its belief that the Pricing Order violates the Commerce Clause of the United States Constitution.
- 20. The defense offered by Respondent fails. While the Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied even handedly

to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states. The payments are based solely on the amount of Class I milk the dealer sells in Massachusetts, and the Order contains a provision to prevent double payment where the same milk is handled by more than one dealer.

- 21. It appears that Respondent bases its Commerce Clause defense on alleged discrimination between in-state producers and out-of-state producers. Assuming, without deciding, that Respondent has standing to assert this claim, the Order does not provide dealers, or consumers, with any incentive to purchase milk from Massachusetts producers as opposed to out-of-state producers. It does not limit the amount of Class I milk imported into Massachusetts.
- 22. Respondent's claim that the Order may affect the amount out-of-state producers received, beyond the federally established minimum price, is not supported by the record. This claim is based on the underlying assumption that Massachusetts' farmers will increase their production, and is not supported by the record which shows that Massachusetts milk production has, in fact, slightly decreased since the implementation of the Order. The contention that Massachusetts' farmers will increase their production is also speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers. Additionally, the contention that an increase in Massachusetts milk production will cause

the premiums paid to out-of-state farmers to decline is not supported by the evidence.

23. Respondent also claims that milk dealers will be harmed by a reduction in demand for milk, since consumer prices will rise and consumption will decrease. This statement is also speculative and unsupported by the record. No evidence was presented that the retail price of milk in Massachusetts has increased as a result of the Order.

#### CONCLUSION

Pursuant to M.G.L. c. 94A §§ 6 and 7, the Commissioner hereby orders the following:

- I. The milk dealer's license of LeComtes/All Star Dairy is hereby revoked, effective on the fourteenth day following receipt of this Decision, unless prior to that date Respondent complies with the following:
  - A. submits a completed monthly reporting schedule and submits an accompanying payment for the month of June and July, 1992; and
  - B. submits completely monthly reporting schedules and payments for any subsequent month in which it failed to comply with the Order.

All submissions are to be made during business hours at the offices of the Department of Food and Agriculture, Room 2103, 100 Cambridge Street, Boston, Massachusetts.

#### **RIGHT TO APPEAL**

Pursuant to M.G.L. c. 94A §§ 8 and 21, any applicant, licensee or person aggrieved by any decision or order adopted by the commissioner may appeal therefrom by filing a petition in the superior court within twenty days after service of notice of such order. Upon such appeal, said court may revise or reverse such decision if such action, in its opinion, is warranted by the evidence or in accordance with the standards for review provided in G.L. c. 30, § 14(7).

#### EFFECTIVE DATES AND PARTIES BOND

This Decision remains effective unless modified by the Commissioner of Food and Agriculture. Issuance of this Decision shall not preclude and shall not be deemed an election to forgo any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties in accordance with M.G.L. c. 94A § 22.

Failure to comply with this Decision may subject the responsible party to further Agency action and referral of this matter to the Massachusetts Attorney General's Office for additional civil action.

Signed this 16th day of November, 1992.

GREGORY C. WATSON COMMISSIONER

#### COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. CIVIL ACTION NO. 92-6914

WEST LYNN CREAMERY, INC.,
Plaintiff,
v.

GREGORY WATSON, COMMISSIONER
Massachusetts Department
of Food and Agriculture,
Defendant.

#### PETITION FOR REVIEW OF COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE'S DECISIONS

Pursuant to M.G.L. ch. 94A, §§ 8 and 21, West Lynn Creamery, Inc. ("West Lynn") hereby petitions this Court to review the decision of the Commissioner of Food and Agriculture (the "Commissioner"), dated November 16, 1992, conditionally revoking West Lynn's milk dealer's license for failure to make "assessment" payments pursuant to the Commissioner's Amended Pricing Order (the "Pricing Order").

#### **PARTIES**

1. The plaintiff, West Lynn, is a Massachusetts corporation with a principal place of business in Lynn, Massachusetts. West Lynn is licensed by the Commissioner to sell milk in the Commonwealth of Massachusetts. West Lynn purchases raw milk from producers (dairy farmers) and producer-cooperatives. It then processes and packages milk in its processing

plant and sells in Massachusetts approximately 60% of the milk that it purchases. West Lynn purchases 97.3% of its milk from farms located outside the Commonwealth.

2. The defendant Gregory Watson is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which is charged, *inter alia*, with-the regulation of the milk industry in Massachusetts under the provisions of M.G.L. ch. 94A. The Commissioner, acting in his official capacity, promulgated and enforces the 1992 Pricing Order which is the subject of this Complaint.

#### **BACKGROUND**

- 3. On January 28, 1992, the Commissioner, citing the Massachusetts Milk Control Law, M.G.L. ch. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry. On the basis of that declaration, the Commissioner issued a Pricing Order on February 18, 1992, which was amended on February 26, 1992. A copy of the Findings and Declaration of State of Emergency, and the Pricing Order (as amended), are attached as Exhibits A and B, respectively.
- 4. The Pricing Order requires all licensed milk dealers doing business in Massachusetts, including West Lynn, to pay into the Massachusetts Dairy Equalization Fund (the "Fund") on a monthly basis an "assessment" based on the amount of Class I milk sold for consumption in Massachusetts, irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers.
- 5. The amounts paid into the Fund are held by the Commissioner and are not deposited into the General Fund of the Commonwealth. The monies deposited into the Fund are distributed monthly by the Commissioner pro rata to Massachusetts dairy farmers only, notwithstanding that most of the milk purchased by West Lynn and sold to consumers in Massachusetts is imported from other states.

- 6. Pursuant to the express terms of the Pricing Order, the total annual assessment against West Lynn will amount to more than \$1 million (\$107,201.70 in May of 1992), all of which is to be distributed to Massachusetts producers only, despite the fact that 97% of the milk purchased by West Lynn is produced by out-of-state farmers.
- 7. West Lynn paid \$80,571.85 into the Fund on or about May 25, 1992 for the April Assessment. These funds were then distributed by the Commissioner to approximately four hundred eighteen (418) Massachusetts dairy farmers on or about June 15, 1992. No funds were distributed to out-of-state farmers.
- 8. On June 25, 1992, the Commissioner determined that West Lynn was required to make an assessment payment for the month of May pursuant to the Pricing Order. West Lynn objected to making payment and asserted that the Pricing Order burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.
- 9. On July 2, 1992, West Lynn, under protest, made payment to the Commissioner in the amount of \$107,201.70 for the May assessment.
- The Commissioner disbursed West Lynn's \$107,201.70 payment amongst the Massachusetts farmers in July of 1992.
- 11. Under the Pricing Order, West Lynn's June assessment was due on July 25, 1992. West Lynn, however, did not make that payment because the Pricing Order violates the Commerce Clause of the United States Constitution.
- 12. Under the Pricing Order, West Lynn's July assessment was due on August 25, 1992. West Lynn, however, did not make that payment because the Pricing Order violates the Commerce Clause of the United States Constitution.
- 13. On September 9, 1992, West Lynn received a Notice from the Commissioner. A copy of the Notice is attached as Exhibit C. The Notice set a hearing date to "revoke, modify

or suspend" West Lynn's license to sell milk. No reason for the proposed action was set forth in the Notice.

JA101

- On September 14, 1992, the Commissioner conducted a hearing pursuant to Exhibit C.
- 15. On November 16, 1992, the Commissioner conditionally revoked West Lynn's license to sell milk in the Commonwealth of Massachusetts for failure to make assessment payments under the Pricing Order. A true copy of the Commissioner's decision is attached as Exhibit D.
- 16. West Lynn does not intend to comply with the conditions imposed by the Commissioner's November 16, 1992 Order because it believes that the imposition of these conditions violates the Commerce Clause.
- 17. The revocation of West Lynn's milk dealer's license will cause West Lynn to suffer irreparable harm in that it will not be able to sell milk lawfully within the Commonwealth.
- 18. If West Lynn is not able to sell milk in the Commonwealth, it will be substantially damaged and more than 1,000 employees may be laid off from their jobs.
- 19. The Actions of the Commissioner, as set forth above, violate the Commerce Clause of the United States Constitution.
- 20. The Notice of Hearing, Exhibit C, does not provide adequate notice of the purpose of the hearing in violation of the due process clauses of the Massachusetts and United States Constitutions.
- 21. The hearing conducted by the Commissioner on September 14, 1992 violated the due process clauses of the United States and Massachusetts Constitutions because the Commissioner was not a fair and impartial hearing officer in that he was seeking to enforce an Order that he personally promulgated.
- 22. The findings of the Commissioner with respect to the effect of the Amended Pricing Order on interstate commerce and with respect to the effect of the Amended Pricing Order on the production and demand for milk are not supported by substantial evidence and are clearly erroneous.

WHEREFORE, West Lynn Creamery, Inc. respectfully requests this Court to grant the following relief:

- reverse the Commissioner's order conditionally revoking West Lynn's milk dealer's license for failure to make assessment payments pursuant to the Amended Pricing Order;
- declare the Commissioner's order unlawful and unconstitutional;
- stay the Commissioner's November 16, 1992 decision conditionally revoking West Lynn's milk dealers' license effective December 1, 1992.
- 4. stay all enforcement action by the Commissioner, particularly any actions which may result in the revocation of West Lynn's milk dealer's license or the imposition of any penalty, as a result of West Lynn's failure to make assessment payments;
- issue a short order of notice on paragraphs 3 and 4, above;
- grant such other and further relief which this Court deems just and proper.

WEST LYNN CREAMERY, INC. By its attorneys,

Michael L. Altman BBO No. 016800 Margaret A. Robbins BBO No. 559920 Rubin and Rudman 50 Rowes Wharf Boston, Massachusetts 02110 (617) 330-7074

Dated: November 17, 1992

#### **JA103**

#### COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	NO. 92-6924
LeCOMTE'S DAIRY, INC.,	)
Plaintiff,	)
	)
٧.	)
GREGORY WATSON,	)
COMMISSIONER, Massachusetts	)
Department of Food and	)
Agriculture,	)
Defendant.	)

#### PETITION FOR REVIEW OF COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE'S DECISIONS

Pursuant to M.G.L. ch. 94A, §§ 8 and 21, LeComte's Dairy, Inc. ("LeComte's") hereby petitions this Court to review the decision of the Commissioner of Food and Agriculture (the "Commissioner"), dated November 16, 1992, conditionally revoking LeComte's milk dealer's license for failure to make "assessment" payments pursuant to the Commissioner's Amended Pricing Order (the "Pricing Order").

#### **PARTIES**

 The plaintiff, LeComte's Dairy, Inc. ("LeComte's") is a Massachusetts corporation with a principal place of business in Somerset, Massachusetts. LeComte's sells milk and related dairy products to various retailers, convenience stores, nursing homes, restaurants, etc. LeComte's is a milk dealer, licensed by the defendant Commissioner, pursuant to M.G.L. ch. 94A, to sell milk in the Commonwealth of Massachusetts. It purchases one hundred (100%) percent of its fluid milk products from West Lynn Creamery, Inc. West Lynn Creamery purchases 97.3% of its raw milk from out-of-state farmers.

2. The defendant Gregory Watson is the Commissioner of the Massachusetts Department of Food and Agriculture, the state administrative agency which is charged, inter alia, withthe regulation of the milk industry in Massachusetts under the provisions of M.G.L. ch. 94A. The Commissioner, acting in his official capacity, promulgated and enforces the 1992 Pricing Order which is the subject of this Complaint.

#### **BACKGROUND**

- 3. On January 28, 1992, the Commissioner, citing the Massachusetts Milk Control Law, M.G.L. ch. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry. On the basis of that declaration, the Commissioner issued a Pricing Order on February 18, 1992, which was amended on February 26, 1992. A copy of the Findings and Declaration of State of Emergency, and the Pricing Order (as amended), are attached as Exhibits A and B, respectively.
- 4. The Pricing Order requires all licensed milk dealers doing business in Massachusetts, including LeComte's, to pay into the Massachusetts Dairy Equalization Fund (the "Fund") on a montary basis an "assessment" based on the amount of Class I milk sold for consumption in Massachusetts, irrespective of whether the milk dealer purchased its raw milk from Massachusetts or from out-of-state producers.
- The amounts paid into the Fund are held by the Commissioner and are not deposited into the General Fund of the Commonwealth. The monies deposited into the Fund are dis-

tributed monthly by the Commissioner pro rata to Massachusetts dairy farmers only, notwithstanding that most of the milk purchased by LeComte's and sold to consumers in Massachusetts is imported from other states.

- 6. On or about May 25, 1992 LeComte's paid \$3,195.54 into the Fund for its April Assessment. These funds were then distributed by the Commissioner to approximately four hundred eighteen (418) Massachusetts dairy farmers on or about June 15, 1992. No funds were distributed to out-of-state farmers.
- On or about June 25, 1992, LeComte's paid \$4,248.63 to the Commissioner pursuant to his Pricing Order. The Commissioner disbursed LeComte's payment to the Massachusetts farmers in July of 1992.
- Under the Pricing Order, LeComte's June assessment was due on July 25, 1992. LeComte's did not make payment because the Pricing Order violates the Commerce Clause of the United States Constitution.
- Under the Pricing Order, LeComte's July assessment was due on August 25, 1992. LeComte's did not make payment because the Pricing Order violates the Commerce Clause of the United States Constitution.
- 10. On September 9, 1992, LeComte's received a Notice from the Commissioner. A copy of the Notice is attached as Exhibit C. The Notice set a hearing date to "revoke, modify or suspend" LeComte's license to sell milk. No reason for the proposed action was set forth in the Notice.
- On September 14, 1992, the Commissioner conducted a hearing pursuant to Exhibit C.
- 12. On November 16, 1992, the Commissioner conditionally revoked LeComte's license to sell milk in the Commonwealth of Massachusetts for failure to make assessment payments under the Pricing Order. A copy of the Order issued by the Commissioner is attached as Exhibit D.
- 13. LeComte's does not intend to comply with the conditions imposed by the Commissioner's November 16, 1992

Order because it believes that the imposition of these conditions violates the Commerce Clause.

- 14. The revocation of LeComte's license to sell milk will cause LeComte's to suffer irreparable harm in that it will not be able to sell milk lawfully in the Commonwealth.
- If LeComte's is not able to sell milk in the Commonwealth, it will suffer substantial economic loss.
- The actions of the Commissioner, as set forth above, violate the Commerce Clause of the United States Constitution.
- 17. The Notice of Hearing, Exhibit C, does not provide adequate notice of the purpose of the hearing in violation of the due process clauses of the Massachusetts and United States Constitutions.
- 18. The hearing conducted by the Commissioner on September 14, 1992 violated the due process clauses of the United States and Massachusetts Constitutions because the Commissioner was not a fair and impartial hearing officer in that he was seeking to enforce an Order that he personally promulgated.
- 19. The findings of the Commissioner with respect to the effect of the Amended Pricing Order on interstate commerce and with respect to the effect of the Amended Pricing Order on the production and demand for milk are not supported by substantial evidence and are clearly erroneous.

WHEREFORE, LeComte's Dairy, Inc. respectfully requests this Court to grant the following relief:

- reverse the Commissioner's order conditionally revoking LeComte's milk dealer's license for failure to make assessment payments pursuant to the Amended Pricing Order;
- declare the Commissioner's order unlawful and unconstitutional;
- stay the Commissioner's November 16, 1992 decision conditionally revoking LeComte's milk dealers' license effective December 1, 1992;

#### JA107

- stay all enforcement action by the Commissioner, particularly any actions which may result in the revocation of LeComte's milk dealer's license or the imposition of any penalty, as a result of LeComte's failure to make the June payment;
  - 4. issue a short order of notice on paragraph 3, above; and
- grant such other and further relief which this Court deems just and proper.

LECOMTE'S DAIRY, INC. By its attorneys,

Michael L. Altman BBO No. 016800 Margaret A. Robbins BBO No. 559920 Rubin and Rudman 50 Rowes Wharf Boston, Massachusetts 02110 (617) 330-7074

Dated: November 17, 1992

#### COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT CIVIL ACTIONS

WEST LYNN CREAMERY, INC. and LeCOMTE'S DAIRY, INC.

VS.

NO. 92-4610G

GREGORY C. WATSON, COMMISSIONER MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

WEST LYNN CREAMERY, INC.

VS.

NO. 92-6914G

GREGORY C. WATSON, COMMISSIONER
LeCOMTE'S DAIRY, INC.

VS.

NO. 9224G

GREGORY C. WATSON, COMMISSIONER

#### MEMORANDUM AND ORDER DENYING INJUNCTIVE RELIEF

The plaintiffs process, package and/or sell milk under license of the Massachusetts Department of Food and Agriculture.

The defendant Watson is the Commissioner of the Department. On January 28, 1992, the Commissioner, acting pursuant to G.L. c. 94A, § 12, declared a state of emergency to exist in the Massachusetts dairy industry and issued an Amended Pricing Order on February 26, 1992.

The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Liquidization Fund. The amounts deposited are then distributed to dairy farmers in the Commonwealth.

For the purposes of this proceeding, the three (3) captioned cases will be considered as a single action.

The plaintiff West Lynn Creamery, Inc. (West Lynn) did not pay the assessment due on July 25, 1992 nor in the months thereafter. Neither did LeComte's Dairy, Inc. and some other milk dealers.

After notice, the Commissioner conducted a hearing on September 14 1992 and by a Decision dated November 16, 1992, conditionally revoked West Lynn's milk dealers license for failure to pay the assessment required by the Pricing Order. The license will be revoked on December 1, 1992 unless the assessment is paid.

The plaintiffs are requesting a preliminary injunction to enjoin the Commissioner from revoking West Lynn's and LeComte's milk dealers licenses on that date.

In its Petition For Review, West Lynn asserts that it does not intend to comply with the conditions imposed by the November 16, 1992 Order of the Commissioner because it believes that those conditions violate the Commerce Clause of the United States Constitution. It further states that if it is not licensed to sell milk in the Commonwealth after December 1, 1992, more than 1,000 employees may be laid off.

This position is confirmed by an affidavit of one of the principal owners and Executive Vice President for Sales and Marketing delivered to the court this morning.

This is a choice West Lynn must make. A more reasonable approach might be to pay the assessment and seek an early hearing on the merits.

After considering the arguments, briefs and other well prepared submissions of counsel and studying the findings, declarations, orders and decisions of the Commissioner of the Massachusetts Department of Food and Agriculture, the plaintiffs have not demonstrated a reasonable like!ihood of success on the merits or that they would suffer irreparable harm if injunctive relief was not granted.

#### **ORDER**

Accordingly, it is **ORDERED** that entry be made **DENY- ING** PLAINTIFF'S SECOND EMERGENCY MOTION FOR PRELIMINARY INJUNCTION dated November 17, 1992.

John L. Murphy, Jr. Justice of the Superior Court

DATED: November 24, 1992

#### JA111

#### COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT CIVIL ACTION No. 92-4610-G

WEST LYNN CREAMERY, INC. and LeCOMTE'S DAIRY, INC.

vs.

GREGORY C. WATSON, COMMISSIONER MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

SUFFOLK, ss.

CIVIL ACTION No. 92-6914-G

WEST LYNN CREAMERY, INC.

VS.

GREGORY WATSON, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

SUFFOLK, ss.

CIVIL ACTION No. 92-6924-G

LeCOMTE'S DAIRY, INC.

VS.

GREGORY C. WATSON, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF FOOD AND AGRICULTURE

# AMENDMENT TO MEMORANDUM AND ORDER DENYING INJUNCTIVE RELIEF ENTERED ON NOVEMBER 24, 1992

The fourth paragraph of the above mentioned Memorandum and Order is amended by striking the word "Liquidation" and inserting in place thereof the word "Equalization" so that the sentence reads:

The Pricing Order requires all licensed milk dealers doing business in Massachusetts to pay a monthly assessment into the Massachusetts Dairy Equalization Fund.

SO ORDERED.

John L. Murphy, Jr. Justice of the Superior Court

DATED: November 25, 1992

#### **JA113**

#### COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

92-J-827

WEST LYNN'S CREAMERY, INC. and LeCOMTE'S DAIRY, INC.

VS.

COMMISSIONER OF MASSACHUSETTS
DEPARTMENT OF FOOD AND AGRICULTURE
(and two companion cases).

#### **ORDER**

These cases come before me under G.L. c. 231, § 118, par. 1. The petitioners seek relief from an order entered in the Superior Court on November 24, 1992, denying their motions for preliminary injunctions to stop the revocations on December 1, 1992, of their milk dealer's licenses. On November 25 I entered an order staying the revocations pending disposition of West Lynn Creamery's and LeComte's Dairy petition for review.

The threatened revocations were based on the failure of the two dealers to make payments for the months of June and July, 1992, into the Massachusetts Dairy Equalization Fund, established by an "Amended Pricing Order" entered February 26, 1992. This was an emergency order intended to infuse cash into Massachusetts dairy farms (producers), which were faced with the danger of extinction due to rising costs of production and falling Federal milk price-supports. The payments by milk dealers into the fund were to be based on a formula computed on the basis of a differential between a target price calculated to stabilize the market and the so called "zone 21 blend price" reported monthly by the United States

Department of Agriculture, multiplying the difference by the amount of milk sold monthly for consumption in Massachusetts, calculated in pounds. The fund is distributed monthly to Massachusetts producers in relation to their monthly production (up to a 200,000 pound limit).

From an affidavit furnished by the Commissioner, it appears that dealers generally complied with the amended price order at the outset until West Lynn Creamery and LeComte's Dairy refused to make the payments due for June and July. The result was a shortfall in the fund for distribution in July and August. By October most dealers were refusing to pay their monthly assessments, and the fund is apparently now inoperative. The Commissioner entered orders on November 16 revoking the licenses of West Lynn Creamery and LeComte's Dairy for failure to make payments for June and July. The orders were not to take effect until December 1 and would not take effect at all if the two dealers were to make the required payments for June and July and were to file reports for the subsequent months, with the required payments, by December 1. On November 17 the dealers filed petitions for judicial review of the revocation orders under G. L. c. 94A, §§ 8 and 21, and, in conjunction therewith, sought the preliminary injunctive relief that was denied in the Superior Court.

The dealers' contention is that the pricing orders establishing the Equalization Fund are invalid under the Commerce Clause of the United States Constitution. They argue that they will suffer irreparable harm if they are made to pay their mandated assessments into the fund because the amounts paid in are distributed to producers by the fifth day of the succeeding month and will be unrecoverable as a practical matter. At the hearing before me they offered to pay into court, to be held in escrow pending determination of their petitions for review, the amounts that were due through November 25, 1992, which apparently total \$367,343 in the case of West Lynn Creamery and \$11,732 in the case of LeComte's Dairy.

The escrow solution is not acceptable to the Commissioner or to the producers (as represented by various amici curiae, such as the Massachusetts Farm Bureau Federation and the Massachusetts Assn. of Dairy Farmers) in light of the emergency existing among the producers, most of which are small or small to moderate sized dairy farms, and in light of their position that the money was raised, in practical effect from Massachusetts consumers and is equitably owned either by them or by Massachusetts farmers (if the price order is valid) but in no event by the dealers, who, the producers contend, would receive a windfall because they have priced milk for Massachusetts consumption so as to recover the cost of the Equalization Fund assessments.

The only clear aspect of this complicated picture is that the public interest would best be served by the earliest possible resolution of the underlying Constitutional issue. The Equalization Fund is presently inoperative, and dairy farmers are being penalized unfairly if the Amended Price Order is valid and should be enforced. To empower the Commissioner to enforce the price order solves the farmers' problem but is unfair to both Massachusetts consumers and out-of-State producers if the entire pricing scheme is, as the dealers argue, unconstitutional. The continuing uncertainty is prejudicial to dealers, who must set current prices in ignorance whether they will ultimately have to pay the Equalization Fund assessments. A speedy determination of the underlying Constitutional issue is the fairest solution for all parties.

At the hearing the court discussed with counsel the possibility of an early resolution through the vehicle of an interlocutory appeal under G.L. c. 231, § 118, par. 2, from the order denying the preliminary injunction. As the pending petitions for review are governed by Administrative Procedure Act principles, with little or no role for fact-finding by the court, such a resolution seemed plausible. In response to the court's request that counsel

confer amongst themselves and advise the court, I have been informed that counsel for the parties are in agreement on such a course. They have suggested the following accelerated briefing schedule: the dealers' briefs will be submitted on December 9, 1992; the Commissioner's brief on December 17; and the dealer's reply brief, if any, by December 22. The court accepts this schedule and has set the case down for argument at 10:00 A.M., Tuesday, December 29, 1992.

Pending resolution of the appeal, taking into account the likelihood of success on the merits and balancing the hardships and equities to all parties, the court declines (as did the Superior Court judge, Murphy, J.) to stay beyond December 15 the Commissioner's decisions in the license revocation proceedings, as those decisions apply to the assessments that were required to be paid for June (due July 25, 1992), July (due August 25), and August (due September 25), during which times the majority of the milk dealers were paying their assessments into the Equalization Fund. If those payments are made to the Department prior to December 16, the stay of the license revocation decisions that was entered in this court on November 25 will remain in effect pending determination of the appeal, subject to further order by the panel that hears the appeal.<sup>2</sup>

There was some confusion at the hearing concerning the status of certain persons and organizations other than West Lynn Creamery, LeComte's Dairy, and the Commissioner of Agriculture. Prior to the hearing the court allowed several motions to file amicus briefs or memoranda. (These were received and the attorneys involved were heard in the argument.) It was not the court's intention to allow any motion to intervene.

Any such allowance is vacated. For purposes of the appeal this court will treat as parties only those who are parties in the Superior Court proceeding. However, all persons or organizations that were permitted to file amicus briefs in the single justice proceeding are hereby authorized to file amicus briefs in the appeal. Argument by amici will be in the discretion of the panel that hears the appeal. Rule 17 of the Mass. Rules of App. Procedure applies, except that amicus briefs may be filed up to and including December 22.

By the Court (Armstrong, J.),

Assistant Clerk

Entered: December 8, 1992.

The court assumes, of course, that the appeal from the Trial Court's Order denying the injunction has been filed and that the appeal will be entered in this court.

For the sake of clarity, the court states (1) that it has placed no restriction on the Commissioner in the distribution of amounts paid to the Department for the Equalization Fund, and (2) that it is not at this time ordering that the assessments due for September and October be placed in escrow with the court.

S-6140

SUPREME JUDICIAL COURT

WEST LYNN CREAMERY, INC. & another'

VS

# COMMISSIONER OF THE DEPARTMENT OF FOOD AND AGRICULTURE (and two companion cases<sup>2</sup>).

SUFFOLK. January 6, 1993 – April 15, 1993.

PRESENT: WILKINS, ABRAMS, NOLAN, LYNCH, & GREANEY, JJ.

Constitutional Law, Interstate commerce. Milk Control.

A milk pricing order pursuant to G. L. c. 94A, §§ 10-12, issued by the Department of Food and Agriculture, did not discriminate against interstate commerce so as to violate the commerce clause of art. 1, § 8, of the United States Constitution, where the order, having as its purpose the preservation of the viability of the milk industry in the Commonwealth, was not discriminatory on its face; where the order was applied evenhandedly to in-State and out-of-State dealers; and where the regulatory burden it imposed on interstate commerce, by requiring all licensed milk dealers to contribute, according to a prescribed formula, to an "equalization"

fund" for distribution to Massachusetts producers, was merely indirect and incidental. [14-19].

CIVIL ACTIONS commenced in the Superior Court Department, one on July 24, 1992, and two on November 18, 1992.

Motions for preliminary injunctive relief were heard by R. Malcolm Graham, J., and John L. Murphy, Jr., J., respectively.

After the latter two cases were reported to the Appeals Court by J. Harold Flannery, J., the proceedings were consolidated for hearing in that court. The Supreme Judicial Court transferred them on its own initiative.

Michael L. Altman (Margaret A. Robbins with him) for the plaintiffs.

Eric A. Smith, Assistant Attorney General, for the defendant. The following submitted briefs foramici curiae:

Robert J. Sherer & Francis A. DiLuna for Massachusetts Farm Bureau Federation.

Allen Tupper Brown for Massachusetts Association of Dairy Farmers & others.

Marshall M. Schribman for Massachusetts Cooperative Milk Producers Federation, Inc.

Steven J. Rosenbaum & Andrew I. Schoenholtz, of the District of Columbia, & Richard M. Zielinski, Neil v. McKittrick & Joshua M. Davis for Milk Industry Foundation.

NOLAN, J. The plaintiffs, West Lynn Creamery, Inc. (West Lynn), and LeComte's Dairy, Inc. (LeComte), are milk dealers licensed by the Department of Food and Agriculture (department) pursuant to G. L. c. 94A (1990 ed.). West Lynn is a domestic corporation with its principal place of business in

<sup>&#</sup>x27;LeComte's Dairy, Inc.

<sup>&</sup>lt;sup>2</sup>West Lynn Creamery, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6914-G (judicial review of license revocation); LeComte's Dairy, Inc. vs. Commissioner of the Department of Food and Agriculture, Suffolk Superior Court No. 92-6924-G (judicial review of license revocation).

<sup>&#</sup>x27;The department defines a "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk."

Lynn. West Lynn purchases milk from producers and producercooperatives and sells in Massachusetts about sixty per cent of the milk purchased. West Lynn purchases most of its milk from out-of-State producers. LeComte is also a domestic corporation with its principal place of business in Somerset. LeComte purchases all of its milk from West Lynn and sells it to retailers, convenience stores, nursing homes, and restaurants.

Under G. L. c. 94A, the Commissioner of the department is vested with wideranging powers to supervise and regulate the milk industry of the Commonwealth. § 2. Among other things, the Commissioner is empowered to issue licenses to milk dealers, § 5, and to establish minimum prices to be paid for milk "which will best protect the milk industry in the commonwealth and insure a supply of pure, fresh milk adequate to cover consumer needs." § 10. The Commissioner fixes the minimum price to be paid to milk "producers" by issuing an order. §§ 11, 12. The Commissioner is empowered to suspend or revoke the license of a milk dealer who fails to comply with department orders, rules, or regulations. §§ 6, 7. The root of the dispute in the present cases is the Commissioner's revocation of the plaintiffs' milk dealers' licenses due to their failure to comply with a pricing order. The plaintiffs contend that the pricing order violates the commerce clause of art. I. § 8, of the United States Constitution.5 We disagree.

The order that is the subject of this case was issued by the Commissioner in response to the economic crisis facing dairy farmers in Massachusetts. The background to the issuance of the order is as follows. In November, 1991, a petition was delivered to the department requesting that the Commissioner

hold hearings regarding the state of the dairy industry in Massachusetts. See G. L. c. 94A, § 12. The Commissioner held public hearings in January, 1992, conducted subsequent investigations, and interviews, and thereafter declared that the Massachusetts dairy industry was in a state of emergency.

On February 26, 1992, in response to this state of emergency, the Commissioner issued an amended pricing order, pursuant to G. L. c. 94A, §§ 10-12.7 The pricing order sets forth a plan designed to boost the amount of money local dairy farmers — the producers — receive for milk above and beyond that required by the Federal program.8 The pricing order requires milk

<sup>&#</sup>x27;The department defines a "producer" of milk as "any person producing milk from dairy cattle."

<sup>&#</sup>x27;The commerce clause provides that "congress shall have power to regulate commerce with foreign nations, and among the several states."

<sup>&</sup>quot;The Commissioner declared that "an emergency of unprecedented proportions exists within the Massachusetts dairy industry. This crisis threatens... the economy of our entire state, the enviable lifestyle we enjoy here, and the health of our consumers.....

<sup>&</sup>quot;The industry, nationwide, is in serious trouble, and ultimately a federal solution will be required. In the meantime, we must act on the state level to preserve our local industry and its attendant benefits. While the dairy farmers receive prices for their product equal to those in 1978, the costs of producing milk continue to skyrocket out of their control. . . .

<sup>&</sup>quot;Dairying maintains hundreds of thousands of acres of open space and the scenic vistas on which our state's vital tourist industry depends. It generates millions of dollars into our economy, in payroll, taxes and purchases, while providing a fresh and nutritious food product at a fraction of the price paid by consumers elsewhere in the nation and the world.

<sup>&</sup>quot;Therefore, I hereby declare that a state of emergency exists in relation to the Massachusetts dairy producers and that immediate action must be taken to address this problem."

<sup>&#</sup>x27;The Commissioner's first order was issued on February 18, 1992. The amended order was issued "for technical, clarification purposes." The February 18, 1992, order is not at issue on this appeal.

<sup>&</sup>quot;The preamble to the pricing order provides: "The purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry. The price the farmer is paid for his milk is established by a highly regulated federal pricing system. Massachusetts producers are facing an emergency situation due to these federally set prices. This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product. Through stabilizing the price producers are paid for their product, consumers will be assured of a local supply of fresh milk."

dealers to submit monthly reports and to contribute to the Massachusetts Dairy Equalization Fund (fund). The monthly reports require, among other things, each licensed milk dealer to report the amount of "Class I" milk sold for consumption in Massachusetts during the reporting period. Each milk dealer's monthly contribution to the Fund is calculated by multiplying the volume of "Class I" milk sold during the reporting month, regardless of point of origin, by an "Order Premium." The Commissioner distributes the fund to producers in proportion to the milk produced in Massachusetts during the preceding month. The pricing order took effect immediately. The first monthly report, covering April, 1992, was due May 25, 1992.

West Lynn and LeComte submitted reports for the periods April through July, 1992. The plaintiffs paid their premiums for April and May, but discontinued payments thereafter. On July 24, 1992, the plaintiffs filed an action in the Superior Court Department alleging, among other things, that the pricing order violated the commerce clause. They argued that the pricing order places out-of-State farmers at a competitive disadvantage because it subsidizes Massachusetts farmers but not out-of-State farmers, all of whom are selling milk in Massachusetts, and sought declaratory relief, damages, a preliminary injunction, and a permanent injunction to prevent the Commissioner from collecting the monthly premiums. On July, 31, 1992, a judge in the Superior Court denied the plaintiffs' request because they had failed to establish irreparable harm. The judge

also denied their request to deposit the required premiums with the court.11

Meanwhile, West Lynn and LeComte continued to dispute the legality of the pricing order, and failed to comply with its provisions. In June and July, 1992, the Commissioner initiated administrative action against both West Lynn and LeComte seeking to suspend or to revoke their licenses for failing to comply with the pricing order.

In response to the Commissioner's action, on August 7, 1992, plaintiffs filed an "emergency" motion for a preliminary injunction seeking the same relief that the earlier motion sought: a preliminary injunction enjoining the Commissioner from imposing any penalty, including but not limited to, suspending or revoking their milk dealers' licenses for failure to pay the equalization premiums required by the Commissioner's amended pricing order. On August 14, 1992, the judge denied the requests for preliminary injunctive relief because the plaintiffs again failed to demonstrate any irreparable harm. The judge held that payment into the fund does not constitute irreparable harm because the pricing order does not require the plaintiffs to absorb the cost of the equalization premiums. Rather, the judge reasoned, the plaintiffs can pass on the equalization premiums to consumers. The judge also noted that, if the Commissioner should suspend or revoke the plaintiffs' licenses, his decision is reviewable, G. L. c. 94A, § 8; hence, their claim was premature.

On September 14, 1992, the Commissioner held hearings, and on November 16, 1992, conditionally revoked the plaintiffs' licenses, see G. L. c. 94A, §§ 6, 7, for failing to comply with the pricing order. <sup>12</sup> The Commissioner denied the plain-

<sup>&</sup>quot;The "Class I" designation refers to milk consumed as fluid rather than processed into other products, e.g., cheese.

The pricing order establishes a target price for milk. The order premium is equal to one-third of the difference between the target price and the so-called "blend price" reported monthly by the United States Department of Agriculture. In the pricing order the Commissioner fixed the target price at \$15 a hundred pounds of milk (hundredweight or cwt.). Assuming that the federally mandated price is \$12 a cwt., the order premium would be \$1.

<sup>&</sup>lt;sup>11</sup>The plaintiffs assert that, once the payments are paid into the fund and distributed to Massachusetts dairy farmers, there is no practical remedy for recouping the funds if the pricing order is found to be unconstitutional.

Of The Commissioner conditioned revocation of the licenses on continuing non-compliance with the pricing order. The Commissioner's revocation order was effective fourteen days after issuance.

tiffs' commerce clause challenge, stating, "[W]hile the [Pricing] Order is designed to benefit Massachusetts dairy farmers, it does not do so by discriminating against or burdening interstate commerce. The Order is applied evenhandedly to all milk dealers, wherever located, handling milk for sale in Massachusetts. The Order does not discriminate among dealers based on the source of the milk they purchase or the amount of milk they sell in other states."

On November 17, 1992, the plaintiffs filed a second emergency motion for a preliminary injunction requesting that the Superior Court enjoin the Commissioner from revoking their licenses. In an affidavit supporting its motion, West Lynn stated that it did not intend to comply with the conditions of the Commissioner's November 16, order. West Lynn also noted that, if it is not licensed to sell milk in the Commonwealth, more than 1,000 employees may be laid off. Additionally, on November 18, 1992, the plaintiffs filed separate actions in the Superior Court seeking judicial review of the Commissioner's decisions to revoke the plaintiffs' milk licenses, G.L. c. 94A, §§ 8, 21, and requesting stays of enforcement action pending judicial review.

On November 24, 1992, a Superior Court judge, in a consolidated order, amended on November 25, denied the plaintiffs' second request for an emergency preliminary injunction, and their request for a stay of the revocation action pending judicial review. The judge reasoned that the plaintiffs had failed to demonstrate a reasonable likelihood of success on the merits and that they would suffer irreparable harm. The judge wrote that the plaintiffs should "pay the assessment [premium] and seek an early hearing on the merits." The plaintiffs then petitioned a single justice of the Appeals Court, G. L. c. 231, § 118, 1st par. (1990 ed.), seeking interlocutory relief from the Superior Court's denial of the emergency motion for a preliminary injunction. On November 25, 1992, the single

justice issued an order staying the Commissioner's November 16, 1992, revocation orders pending further review. After a hearing on December 1, 1992, the single justice agreed to extend the stay beyond December 15, 1992, if the plaintiffs paid the amounts due under the pricing order for the months June, July, and August, 1992.

On December 11, 1992, another judge in the Superior Court, reserved and reported the plaintiffs' cases concerning judicial review of the Commissioner's revocation orders to the Appeals Court. See Mass. R. Civ. P. 64, 365 Mass. 831 (1974). On December 15, 1992, the Appeals Court granted a motion to consolidate the three cases.

To expedite the appeals, the parties agreed, with the assent of the single justice, to seek interlocutory relief from a panel of the Appeals Court pursuant to G. L. c. 231, § 118, 2d par. We transferred these cases to this court on our own motion, and we hold the pricing order constitutional.

The sole question facing us from the three appeals concerns the constitutionality of the pricing order. It is long established that, while a literal reading of the commerce clause evinces a grant of power to Congress, it "directly limits the power of the States to discriminate against interstate commerce." Wyoming v. Oklahoma, 112 S. Ct. 789, 800 (1992). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Id., quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-274 (1988). If the Commissioner's pricing order discriminates against interstate commerce, either on its face or in practical effect, the burden falls on the Commissioner "to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." Maine v. Taylor, 477 U.S. 131, 138 (1986), citing Hughes v. Oklahoma, 441 U.S.

322, 336 (1979). Justification supporting a discriminatory measure is subjected to strict scrutiny. *Id.* at 138, 144. In cases where the regulatory measure under study amounts to "simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied." *Wyoming* v. *Oklahoma*, *supra* at 800, quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

On the other hand, if the pricing order has only indirect or incidental effects on interstate commerce, it will be found to violate the commerce clause only if the burdens imposed on interstate commerce are "clearly excessive in relation to the putative local benefits." *Maine* v. *Taylor*, *supra* at 138, quoting *Pike* v. *Bruce Church*, *Inc.*, 397 U.S. 137, 142 (1970). The Court has applied reduced scrutiny in such cases, but there is no clear line separating close cases on which scrutiny should apply. See *Wyoming* v. *Oklahoma*, *supra* at 800 n.12, and cases cited.

As one would expect, the plaintiffs contend that the Commissioner's pricing order is discriminatory on its face, and argue in favor of the application of strict scrutiny. The Commissioner contends that we should review the matter with reduced scrutiny because the pricing order burdens interstate commerce incidentally, if at all. We hold that the pricing order does not discriminate on its face, is evenhanded in its application, and only incidentally burdens interstate commerce. Our conclusion flows from the manner in which milk dealers are called on to contribute to the Fund.

All milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the fund. Accordingly, the pricing order does not favor in-State milk dealers to the detriment of its out-of-State competitors. In this regard, then, the pricing order is evenhanded in its design and effect.

The pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935).

Rather, the milk dealer's premium, as required under the pricing order, is fixed only by the Commissioner's target price, the federally mandated price, and the amount of milk the dealer sells for consumption in Massachusetts. See *supra* at 11-12 & note 10. A milk dealer's required premium is independent of the price the milk dealer has paid for the milk or the milk's point of origin. In this way the pricing order does not manifest any preference for in-State milk over out-of-State milk.

The pricing order is not an attempt to promote the sale of Massachusetts milk to the detriment of out-of-State producers. On the contrary, milk dealers have every reason to seek out the lowest unit price for milk as it will reduce their costs. As noted above, the premium required under the pricing order is independent of the price paid for the milk or its point of origin.

Further, the plaintiffs argue that the pricing order denies out-of-State milk producers the opportunity to compete with in-State milk producers because out-of-State milk, if sold in Massachusetts, is subject to the Massachusetts premium. Assuming, without deciding, that the plaintiffs, as milk dealers, have standing to raise this challenge, the argument is without merit. For the reasons mentioned above, we are not persuaded that the pricing order provides milk dealers an incentive to purchase milk from in-State producers rather than from out-of-State producers.

The Commissioner's pricing order was designed to aid only Massachusetts producers. Indeed, Massachusetts producers are entitled to disbursements from the fund based on the volume of milk produced, to the exclusion of its out-of-State competitors. The plaintiffs contend that this discriminatory distribution plan burdens interstate commerce because it will cause less out-of-State milk to be imported into Massachusetts. As Massachusetts farmers receive more and more money from the fund, the plaintiffs argue, Massachusetts producers will produce more milk, and local production will then constitute a greater percentage of the total milk sold in Massachusetts.

Again we assume, without deciding, that the plaintiffs have standing to assert such a challenge. We concede that the fund distribution scheme affects interstate commerce in this manner but it does so only incidentally. Contrary to the assumption underlying the plaintiffs' argument, it is clear from the Commissioner's "Report Subsequent to Public Hearing" on the state of the dairy industry in Massachusetts, that fund distributions represent an infusion of capital designed solely to save an industry from collapse. Given the Commissioner's report and the balance of the record, we cannot say that fund distributions were intended, or would be sufficient, to expand and develop the Massachusetts dairy industry such that the Commonwealth would be less dependent on "foreign" milk producers.

This not to say, however, that the fund distribution plan is without its adverse impact on interstate commerce. Common sense necessitates a contrary conclusion. The fund distribution scheme does burden out-of-State producers, to the extent that these producers are not entitled to receive fund disbursements, but we hold that the burden is incidental given the purpose and design of the program.

The plaintiffs' reliance on Baldwin v. G.A.F. Seelig, Inc., supra, is misplaced. Baldwin, like the present case, involved milk dealers and State regulation of milk prices. The Baldwin regulation, however, differs from that under study in the present cases. In Baldwin, the United States Supreme Court found unconstitutional a regulation that prohibited State licensed milk dealers from selling milk produced out-of-State unless the out-

of-State milk producers were paid New York's minimum price for the milk. Baldwin v. G.A.F. Seelig, Inc., supra at 519. Justice Cardozo wrote, "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." Id. at 522.

The constitutional infirmity in *Baldwin* was not New York State's desire to aid its farmers to the exclusion of out-of-State farmers but, rather, the protectionist nature of the regulation. While the pricing order in the present case was born of a similar concern for the dairy farmer, the support system that the Commissioner has promulgated, as discussed above, cannot fairly be said to be discriminatory or protectionist as was the one at issue in *Baldwin*. <sup>14</sup>

In the present case, "[t]he end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk, the supply being put in jeopardy when the farmers of the state are unable to earn a living income." *Id.* at 523, citing *Nebbia* v. *New York*, 291 U.S. 502 (1934). Such an end is legitimate. See *Baldwin*, *supra* at 519. The power of the Commonwealth to regulate the milk industry within its borders is clear. See *Farmland Dairies* v. *McGuire*, 789 F. Supp. 1243, 1251

The Commissioner found that the dealers' evidence did not support their claim that the order would affect the price out-of-State producers received from Massachusetts dealers. He further rejected the claim that the order would increase milk production by Massachusetts producers. He found that the record showed that Massachusetts producers had decreased production since the order had gone into effect. The Commissioner reasoned that the prediction of an increase of production was "speculative, given the uncertain duration of the Order, the time, facilities, workload, and initial investment involved to increase a herd size, and the fact that the Order places a cap on the amount of monthly payments to producers."

F. Supp. 1243, 1248 n.5 (S.D.N.Y. 1992), in support of its argument. To the extent that we can discern from the opinion, it is inapposite. *McGuire*, like the present cases, involved State pricing regulation of the milk industry. Like *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and with similar fate, the State involved was New York. The fact distinguishing *McGuire* from the present case is that the price New York State farmers were paid for milk "increased proportionately with the amount of non-New York Class I milk sold in New York." *Id.* at 1248 n.5. Thus the *McGuire* pricing order provided incentive for milk dealers to purchase milk produced in New York to reduce their milk purchasing expenses. As the *McGuire* court found, a regulatory scheme tilted in such a fashion to benefit in-State interests impermissibly burdens interstate commerce. *Id.* at 1254.

(S.D.N.Y. 1992) (State is empowered to fix minimum prices for milk sold by dairy farmers within its borders), citing *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 378 (1964). The premiums required under the pricing order may have detrimental financial impacts on milk dealers such as West Lynn and LeComte, but those detrimental impacts alone do not in our view run afoul of the commerce clause. Rather, the premiums represent one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay. The Commissioner's pricing order may have the unintended adverse effect of reducing the economic viability of milk dealing in Massachusetts. While this may be the case, relief is beyond our province.

In view of the merely incidental burden on interstate commerce, the end to which the pricing order is aimed, and the resultant benefit to the Commonwealth's dairy industry, we conclude that local benefits outweigh any incidental burden on interstate commerce and hold that the pricing order does not violate the commerce clause. We remand the cases to the Superior Court for action not inconsistent with this opinion.

So ordered.

#### JA131

## SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

1412 Courthouse,

Boston, Massachusetts 02108 (617) 557-1020

Michael L. Altman, Esquire Rubin and Rudman 50 Rowes Wharf Boston, MA 02110

Re: No. SJC-06140

WEST LYNN CREAMERY, INC., & another

V.

#### COMMISSIONER OF THE DEPARTMENT OF FOOD AND AGRICULTURE (and two companion cases)

#### NOTICE OF DOCKET ENTRY

Please take note that on June 9, 1993, the following entry was made on the docket of the above-referenced case:

ORDER: Pursuant to the Standing Order dated March 29, 1988, the Emergency Motion for Stay of Issuance of Rescript, Request for Oral Argument and Motion for Stay of Any Order (papers 9, 10 and 11), the Court has considered the motions and they are hereby allowed. The request for oral argument is denied.

Jean M. Kennett, Clerk

Dated: June 9, 1993